124-612

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 137.

EDWARD B. THORNTON, PLAINTIFF IN ERROR.

vs.

FRANCIS SCHREIBER, SR., GERHARD SCHREIBER, HENRY SCHREIBER, AND CONRAD SCHRIEBER, TRADING AS SCHRIEBER & SONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1883.

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1 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between Edward B. Thornton, plaintiff in error, and Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as well for the United States of America as for themselves, defendants in error, in a plea of debt, a manifest error has intervened to the great damage of the said Edward B. Thornton, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourteenth day of May, A. D. one thousand eight hundred and eighty-four, and in the one hundred and eighth year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of Circuit Court, U. S.

2 UNITED STATES OF AMERICA, ss:

To Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as well for the United States of America as for themselves, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Edward B. Thornton — plaintiff and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this first day of July, in the year of our Lord one thousand eight hundred and eighty-four.

WM. BUTLER, *Judge.*

[Endorsed:] I accept service of the within citation. 7, 10, 84. A. Sydney Biddle for Francis Schreiber, Sr., *et al.*

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } ss:

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

EDWARD B. THORNTON, Plaintiff in Error,

vs.

FRANCIS SCHREIBER, SR., GERHARD SCHREIBER, HENRY SCHREIBER, and Conrad Schreiber, Trading as Schreiber and Sons, who Sue as well for the United States of America as for Themselves, Defendants in Error.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October Sessions, 1883, No. 1.

It is thus contained:

Be it remembered that on the 4th day of May, A. D. 1883, Edward B. Thornton, by his attorney, Ezekiel Hunn, Jr., Esq.,
5 comes into court here and sues forth therefrom a writ of error to the district court of the United States in and for the eastern district of Pennsylvania, which, with the record annexed, is in the following words, to wit:

6 In the District Court of the United States for the Eastern District of Pennsylvania, of November Sessions, 1880.

Pleas before the honorable the judges of said court.

It is thus contained:

FRANCIS SCHREIBER, SR., GERHARD SCHREIBER, HENRY Schreiber, and Conrad Schreiber, Trading as Schreiber & Sons, who Sue as well for the United States of America as for Themselves,

vs.

EDWARD B. THORNTON.

} No. 39.

Summons debt, $15,000.

Be it remembered that on the fourth day of February, A. D. 1881, upon *præcipe* filed by John K. Valentine, Esq., attorney of the United States for the eastern district of Pennsylvania, a writ of summons debt issued, which, with the return of the marshal thereto, is in the words & figures following to wit:

7 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon Edward B. Thornton, late of your district, if he may be found therein, so that he be and appear before the judge of the district court of the United States for the eastern district of Pennsylvania, at a session of the same court, to be holden at Philadelphia on the first Monday of February, A. D. 1881, to answer to Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, & Conrad Schreiber, trading as Schreiber & Sons, who sue as well for the United States of Ameaica as for themselves in this behalf, of a plea that he render unto the said plaintiff- the sum of fifteen thousand dollars, which to them he owes and from *him* unjustly detains, as it is said, &c.

And have you then there this writ.

Witness the Honorable William Butler, judge of said court, at Philadelphia, this fourth day of February, A. D. 1881, and in the 105th year of the Independence of the United States.

W. W. CRAIG,
Pro Clerk of District Court, U. S.

Marshal's Return Endorsed.

8 FEB'Y 7, 1881.

Served the within writ on Edward B. Thornton by reading the same in his hearing and leaving a true and attested copy thereof with him.

So answers—

JAMES N. KERNS,
U. S. Marshal,
Per C. McCORMICK, *Deputy.*

9 And afterwards, to wit, on the 2nd day of March, A. D. 1881, John K. Valentine, Esq., attorney as aforesaid, declares against the said Edward B. Thornton in the words & figures following, to wit:

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the District Court of the United States for the Eastern District of Pennsylvania, of November Sessions, 1880. No. 39.

Edward B. Thornton, late of the district aforesaid, was summoned to answer Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sued as well for the United States as for themselves, of a plea that he render to the said plaintiffs the sum of fifteen thousand dollars, lawful money of the United States, which he owes to and unjustly detains from the said plaintiffs.

Whereupon the said plaintiffs, by John K. Valentine, Esquire, their attorney, complain for that whereas the said Francis Schreiber,

Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber,
10 trading as Schreiber & Sons, citizens of the said United States, heretofore, to wit, on the seventeenth day of April, 1880, were the proprietors of a certain photograph which had been duly copyrighted by them upon the full compliance by them with the provisions of the acts of Congress in such case made and provided, to wit, on the seventeenth day of April, 1880, and the title of the same, to wit, "The mother elephant, 'Hebe,' and her baby, 'Americus,' the first one known to have been born in captivity in the world, born at Philadelphia, U. S., March 10, 1880, the property of Cooper and Bailey," was then and there duly recorded with the librarian of Congress according to the provisions of the acts of Congress in such case made and provided, and that by virtue of the acts of Congress in such case made and provided they then and there had the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same for the term of twenty-eight years from the time of the recording the title thereof as aforesaid, to wit, from the said seventeenth day of April, 1880, and that the
11 said defendant heretofore, to wit, on the eighth day of May, 1880, at the district aforesaid, and after the recording of the title of the said photograph as aforesaid, did within the term limited to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, for the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same, and without the consent of the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, proprietors of the said copyright aforesaid, first obtained in writing, signed in presence of two or more witnesses, copy and print the said photograph; and that heretofore, to wit, on the said eighth day of May, 1880, at the district aforesaid, a large number of sheets of the same, to wit, fifteen thousand sheets of the same, were found in the possession of the said defendant so printed and copied as aforesaid.

Whereby and by force of the said act of Congress an action hath accrued to the said Francis Schreiber, Sr., Gerhard Schreiber,
12 Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue, as aforesaid, to demand and have for the said United States of America and for themselves of and from the said defendant the penalty of fifteen thousand dollars above demanded.

Yet the said defendant (although often requested so to do) hath not paid to the said United States of America and to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as aforesaid, or either of them, the said fifteen thousand dollars above demanded, or any part thereof, but to pay the same to them, or either of them, the said defendant hath wholly refused and still doth refuse, and therefore, as well for the said United States as for themselves, the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, bring their suit, etc.

2d count. And also for that whereas the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trad-

13 ing as Schreiber & Sons, citizens of the said United States, heretofore, to wit, on the seventeenth day of April, 1880, were the proprietors of a certain photograph which had been duly copyrighted by them upon the full compliance by them with the provisions of the act of Congress in such case made and provided, to wit, on the seventeenth day of April, 1880, and the title of the same, to wit, "The mother elephant, 'Hebe,' and her baby, 'Americus,' the first one known to have been born in captivity in the world, born at Philadelphia, U. S., March 10, 1880, the property of Cooper & Bailey," was then and there duly recorded with the librarian of Congress according to the provisions of the acts of Congress in such case made and provided, and that by virtue of the acts of Congress in such case made and provided they then and there had the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same for the term of twenty-eight years from the time of the recording the title thereof as aforesaid, to wit, from the said seventeenth day of April, 1880, and that the said defendants heretofore, to wit, on the eighth day
14 of May, 1880, at the district aforesaid, and after the recording of the title of the said photograph as aforesaid, did, within the term limited to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, for the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same, and without the consent of the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, proprietors of the said copyright aforesaid, first obtained in writing, signed in presence of two or more witnesses, publish the said photograph, and that heretofore, to wit, on the said eighth day of May, 1880, at the district aforesaid, a large number of sheets of the same, to wit, fifteen thousand sheets of the same, were found in the possession of the said defendants so published as aforesaid.

Whereby and by force of the said acts of Congress an action has accrued to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons,
15 who sue as aforesaid to demand and have for the said United States of America and for themselves of and from the said defendant the penalty of fifteen thousand dollars above demanded, yet the said defendant (although often requested so to do) hath not paid to the said United States of America and to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as aforesaid, or either of them, the said fifteen thousand dollars above demanded, or any part thereof, but to pay the same to them, or either of them. the said defendant hath wholly refused and still doth refuse, and therefore, as well for the said United States as for themselves, the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber & Conrad Schreiber, trading as Schreiber & Sons, bring their suit, etc.

3rd count. And also for that whereas the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, & Conrad Schreiber,

trading as Schreiber & Sons, citizens of the said United States, heretofore, to wit, on the seventeenth day of April, 1880,
16 were the proprietors of a certain photograph which had been duly copyrighted by them upon the full compliance by them with the provisions of the acts of Congress in such case made and provided, to wit, on the seventeenth day of April, 1880, and the title of the same, to wit, "The mother elephant, 'Hebe,' and her baby, 'Americus,' the first one known to have been born in captivity in the world, born at Philadelphia, U. S., March 10, 1880, the property of Cooper & Bailey," was then and there duly recorded with the librarian of Congress, according to the provisions of the acts of Congress in such case made and provided, and that by virtue of the acts of Congress in such case made & provided they then and there had the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same for the term of twenty-eight years from the time of the recording the title thereof, as aforesaid, to wit, from the said seventeenth day of April, 1880; and that heretofore, to wit, on the
17 eighth day of May, 1880, and after the recording of the title of the said photograph as aforesaid, and within the term limited to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, for the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same, and without the consent of the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, proprietors of said copyright aforesaid, first obtained in writing, signed in the presence of two or more witnesses, the said photograph was illegally printed and published by a person or persons to the said plaintiffs unknown, and that the said defendant, knowing the same to have been so illegally printed and published without the consent of the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, proprietors of the said copyright aforesaid, first obtained in writing, signed
18 in the presence of two or more witnesses, did heretofore, to wit, on the said eighth day of May, 1880, at the district aforesaid, expose to sale a large number of copies of the said photograph, to wit, fifteen thousand copies of the same, so illegally printed and published as aforesaid without the consent of the said proprietors, and that heretofore, to wit, on the said eighth day of May, 1880, at the district aforesaid, a large number of sheets of the same, to wit, fifteen thousand sheets of the same, so illegally printed without the consent of the said proprietors, were found in the possession of the said defendant.

Whereby and by force of the said act of Congress an action hath accrued to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as aforesaid to demand and have, for the said United States of America and for themselves, of and from the said defendant, the penalty of fifteen thousand dollars above demanded.

Yet the said defendant (although often requested so to do)

19 hath not paid to the said United States of America and to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, who sue as aforesaid, or either of them, the said fifteen thousand dollars above demanded, or any part thereof, but to pay the same to them or either of them the said defendant hath wholly refused and still doth refuse, and therefore, as well for the said United States as for themselves, the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, bring their suit, etc.

4th count. And also for that whereas the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, citizens of the said United States, heretofore, to wit, on the seventeenth day of April, 1880, were the proprietors of a certain photograph which had been duly copyrighted by them upon the full compliance by them with the provisions of the acts of Congress in such case made and provided, to wit,

20 on the seventeenth day of April, 1880, and the title of the same, to wit, "The mother elephant, 'Hebe,' and her baby, 'Americus,' the first one known to have been born in captivity in the world, born at Philadelphia, U. S., March 10, 1880, the property of Cooper & Bailey," was then and there duly recorded with the librarian of Congress according to the provisions of the acts of Congress in such case made and provided, and that by virtue of the acts of Congress in such case made and provided they then and there had the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same for the term of twenty-eight years from the time of recording the title thereof as aforesaid, to wit, from the said seventeenth day of April, 1880, and that heretofore, to wit, on the eighth day of May, 1880, and after the recording of the title of the said photograph as aforesaid, and within the term limited to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber,

21 trading as Schreiber & Sons, for the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same, and without the consent of the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, proprietors of the said copyright aforesaid, first obtained in writing, signed in presence of two or more witnesses, the said photograph was illegally printed and published by a person or persons to the said plaintiffs unknown, and that the said defendant, knowing the same to have been so printed and published without the consent of the said Francis Screiber, Sr., Gerhard Screiber, Henry Screiber, and Conrad Screiber, trading as Schreiber and Sons, proprietors of the said copyright aforesaid, first obtained in writing, signed in the presence of two or more witnesses, did heretofore, to wit, on the said eighth day of May, 1880, at the district aforesaid, sell a large number of copies of the same, to wit, one hundred copies of the said photograph so illegally printed and

22 published as aforesaid, and that heretofore, to wit, on the said eighth day of May, 1880, at the district aforesaid, a large

number of sheets of the same, to wit, fifteen thousand sheets of the same, so illegally printed and published as aforesaid, were found in the possession of the said defendant.

Whereby and by force of the said act of Congress an action hath accrued to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, who sue as aforesaid to demand and have, for the said United States of America and for themselves, of and from the said defendant, the penalty of fifteen thousand dollars above demanded.

Yet the said defendant (although often requested so to do) hath not paid to the said United States of America and to the said Francis Screiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Screiber, trading as Schreiber & Sons, who sue as aforesaid, or either of them, the said fifteen thousand dollars above demanded,
23 or any part thereof, but to pay the same to them or either of them the said defendant hath wholly refused and still doth refuse, and therefore, as well for the United States as for themselves, the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, bring their suit, etc.

JOHN K. VALENTINE,
Attorney for Plaintiffs.

And afterwards, to wit, on the 15th day of March, 1883, the said Edward B. Thornton, by his attorney, Ezekiel Hunn, Esq., pleads "not guilty."

24 And afterwards, to wit, on the 17th day of April, A. D. 1883, an agreement in writing is filed in the words and figures following, to wit:

It is agreed—

1. That this case shall be now tried by a jury selected from a panel of jurors in attendance at the present session of the U. S. circuit court for the eastern district of Pa.

2. It is further agreed that the evidence heretofore taken in the case of Schreiber *et al. vs.* Sharpless *et al.*, U. S. D. C. of the east. dist. of Pa., No. 19, of May session, 1880, shall be admitted and read as evidence in this case from the stenographer's notes taken therein, a copy of which notes of testimony is hereunto annexed, and that said evidence shall be taken for every purpose as if repeated in this case.

3. The plaintiffs are also to have the right to call the defendant Thornton to testify upon such material points as he has not already testified to, subject to the question of whether said Thornton's counsel is entitled to object — said Thornton's being called upon to
25 give such additional testimony. The admission of the testimony of Thornton already taken shall not be deemed in any

manner a waiver of his counsel's right to object to his further testimony.

HUNN,
For Thornton, 4, 17, '-3.
A. SYDNEY BIDDLE,
For Plaintiffs, 4, 17, '-3.

(For "copy of notes of testimony" referred to in the foregoing agreement see pages 45–110 of the within record.)

26 And afterwards on the same day, to wit, the 17th day of April, 1883, the plaintiffs, by their counsel, A. Sydney Biddle, Esq., pray leave to amend their declaration in this cause by striking out therefrom the third and fourth counts thereof, and the said amendment is by the court allowed.

And afterwards on the same day, to wit, the 17th day of April, 1883, it is ordered that a jury come to try the issue joined in this cause; and thereupon on the same day come the parties aforesaid, and the jurors of the jury aforesaid, being called, likewise come, to wit:

1, Warren Ingersoll; 2, George Hand; 3, Moses Anderson; 4, Theophilus W. Neff; 5, Joseph N. Piersol; 6, Seymore Raymond; 7, Thomas J. Fox; 8, Maskell Ewing; 9, William F. Donaldson; 10, John M. Driver; 11, William T. Kirk; 12, James Nichol; who
27 are duly impannelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this cause between Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, who sue as well for the United States of America as for themselves, and Edward B. Thornton.

And afterwards, to wit, on the 18th day of April, A. D. 1883, the jurors aforesaid, upon their oaths and affirmations aforesaid, do say that upon the issue joined in this cause they find for the plaintiffs in the sum of fourteen thousand eight hundred dollars, with six cents costs.

And the said verdict is ordered by the court to be recorded, subject to the opinion of the court upon the points for charge this day presented by Ezekiel Hunn, Esq., counsel for defendant, and reserved by the court and ordered to be filed; and the said points for charge, being filed, are in the words and figures following, to wit:

28 *Defendant's Points for Charge.*

The learned court is requested by the defendants to charge the jury as follows:

1. Section 4965 of the Revised Statutes is unconstitutional in so far as it imposes a penalty upon any person who violates a copyright secured to a "proprietor." Reserved.

2. The said section is unconstitutional in so far as it attempts to

secure a copyright to "the proprietor" of the photograph in question. Reserved.

3. The said section is unconstitutional in so far as it attempts to secure to any person or persons a copyright of such photograph as the photograph in question. Reserved.

4. The engraving complained of as a copy is not an illegal interference with the plaintiffs' rights, whatever they may be, in the photograph in question. Reserved.

29 5. The entry of the alleged copyright by the plaintiffs claim- more than they, as applicants for copyright, were entitled to in the subject of their claim, and is for this cause void. Reserved.

6. If the photograph in question could be copyrighted at all this could be done only by pursuing all the provisions relating thereto contained in the Revised Statutes. Reserved.

7. The section 4965, in so far as it refers to a forfeiture or penalty, is to be construed strictly and literally, and not by inference or implication; nor is it to receive an equitable construction. Reserved.

8. The plaintiffs, having brought their action in the names of more than one person, cannot recover. Reserved.

9. The first clause of commission in the section declared upon, viz., the one reading as follows, "Shall engrave, etch, work, copy, print, publish, or import," cannot be implied to parties who are not the actual and original engravers, etchers, workers, copiers, printers, publishers, or importers. Reserved.

30 10. The only clause of commission in the section declared upon that is applicable to this case is the clause reading as follows, viz: "Or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid;" and unless you can bring the defendant under this clause you cannot convict him at all. Reserved.

11. The defendant should not be convicted unless you can find from the testimony both that he knew the photograph had been printed, published, or imported after the recording of the title within the term, and without the consent of the proprietors, as provided in the act, and that, knowing the fact, he sold or exposed for sale. Inapplicable in view of the pl'ffs' reduced claim, they having withdrawn their claim for penalty for copies sold.

12. If you believe from the testimony that the photograph in question, as attempted to be copyrighted, was not the exclusive and original work of the Schreiber-, plaintiffs herein, your verdict must be for the defendant. Refused, do.

13. You cannot find a verdict against the defendant for
31 any amount, except at the rate of one dollar for every copy of the photograph "found in his possession — either printing printed copies published, imported, or exposed for sale by him," he knowing at the time the same to be printed, published, or imported after the recording of the title thereof, during the term limited, and without the consent of the proprietors, as provided in the statute. Affirmed.

14. If you believe from the testimony that the photograph, as at-

tempted to be copyrighted, was finished or in any degree or respect the work of a person or persons other than the said Schreiber, your verdict must be for the defendant. Refused.

15. Placing engraved copies of a photograph or articles of merchandise as advertisements is not "selling them or exposing to sale such copies." Inapplicable in view of reduced claim.

16. Under the testimony as presented the defendant should not be convicted. Refused.

17. Consent being essential to guilt, an unintentional violation of a penal law does not incur the penalty. Refused.

32 And afterwards, to wit, on the 19th day of April, A. D. 1883, the defendant, by his attorney, Ezekiel Hunn, Esq., comes into court and moves the court in arrest of judgment for the plaintiff upon the verdict, as also that a new trial be granted, as also that judgment be entered for the defendant, *non obstante veredicto*, upon the points reserved; and in support of his said several motions he presents to the court in writing his reasons therefor, &, the same being filed, are in the words & figures following, to wit:

33 *Motion in Arrest of Judgment & Reasons in Support of Same.*

And now, this 19th day of April, A. D. 1883, defendant comes into court and moves in arrest of judgment for the following reasons:

I. Because the plaintiffs' narr. does not aver that the plaintiffs, before publication, delivered at the office of the librarian of Congress or deposit- in the mail, addressed to the librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the photograph for which they desired a copyright.

II. Because the plaintiffs' narr. does not aver publication of the photograph.

III. Because the narr. does not aver that within ten days from the publication thereof the plaintiffs delivered at the office of the librarian of Congress or deposited in the mail, addressed to the
34 librarian of Congress, at Washington, District of Columbia, two copies of such photograph.

IV. Because the plaintiffs' narr. does not aver that the plaintiffs or any of them were or are citizens of the United States or residents therein.

V. Because a *qui tam* action does not lie where part of the penalty is given to the informer, not to whoever will sue for it, and the narr. lays the action as a *qui tam* action.

VI. Because more persons than one are joined as common informers in the narr.

VII. Because the action is not brought in the name of the United States, although no other mode is provided by statute.

VIII. Because the plaintiffs' narr. does not allege the offence was committed against the statute.

35 *Motion for a New Trial and Reasons in Support of Same.*

And now, April 19, 1883, Hunn, attorney for the defendant, comes into court and moves that a new trial be granted for the following reasons:

I. Because the learned court erred in refusing to affirm the following points of the defendant:

Twelfth point. If you believe from the testimony that the photograph in question, as attempted to be copyrighted, was not the exclusive & original work of the Schreibers, plaintiffs herein, your verdict must be for the defendant.

Fourteenth point. If you believe from the testimony that the photograph, as attempted to be copyrighted, was finished, or in any degree or respect the work of a person or persons other than the said Screibers, your verdict must be for the defendant.

36 Sixteenth point. Under the testimony as presented the defendant should not be convicted.

Seventeenth point. Consent being essential to guilt, an unintentional violation of a penal law does not incur the penalty.

II. Because the learned court erred in charging the jury as follows:

"The court instruct you that under the evidence, if you believe it, and the court sees nothing that would justify disbelief, the plaintiff is entitled to recover and to have damages assessed at the rate of one dollar for every sheet of that copied photograph found in his possession, and every sheet under his control at the time must be treated as in his possession, notwithstanding the interest his employers may have had in it." * * * "A large number of the copies, according to the testimony, were upon a shelf." * * * "And he obtained these copies for the purpose of labels. They were

37 found in the store where he was and under his charge." * * * "I repeat what I have said, that every sheet under his control (thus under his control), notwithstanding the interest that the firm of Sharpless & Sons may have had in them, every sheet thus subject to his control, must be regarded, for the purposes of this suit, as in his possession, and for every sheet thus found in his possession, if you find for the plaintiff, and I see nothing that would justify you in not so finding." * * *

III. Because the verdict was against the law.

IV. Because the verdict was against the evidence.

V. Because the verdict was against the weight of the evidence.

HUNN,
For Defendant.

38 *Motion for Judgment for the Defendant Non Obstante Veredicto & Reasons in Support of Same.*

And now, April 19, 1883, Hunn, attorney for the defendant, comes in court here and, by leave of court, moves that judgment *non obstante veredicto* be entered in the above cause in favor of the defendant on those of the defendant's points which were reserved by the court, viz:

I. Section 4965 of the Revised Statutes is unconstitutional in so far as it imposes a penalty upon any person who violates a copyright secured to a "proprietor."

II. The said section is unconstitutional in so far as it attempts to secure a copyright to "the proprietor" of the photograph in question.

III. The said section is unconstitutional in so far as it attempts to secure to any person or persons a copyright of such photographs as the photographs in question.

39 IV. The engraving complained of as a copy is not an illegal interference with the plaintiffs' rights, whatever they may be, in the photograph in question.

V. The entry of the alleged copyright by the plaintiffs claim- more than they, as applicants for copyright, were entitled to in the subject of their claim, and is for this cause void.

VI. If the photograph in question could be copyrighted at all this could be done only by pursuing all the provisions relating thereto contained in the Revised Statutes.

VII. The section 4965, in so far as it refers to a forfeiture or penalty, is to be construed strictly and literally and not by inference or by implication, nor is it to receive an equitable construction.

VIII. The plaintiffs, having brought their action in the names of more than one person, cannot recover.

IX. The first clause of commission in the section declared
40 upon, viz., the one reading as follows, "Shall engrave, etch, work, copy, print, publish, or import," cannot be applied to parties who are not the actual and original engravers, etchers, workers, copiers, painters, publishers, or importers.

X. The only clause of commission in the section declared upon that is applicable to this case is the clause reading as follows, viz: "Or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid," and unless you can bring the defendant under this clause you cannot convict him at all.

41 And afterwards, the cause having been argued by the counsel of the respective parties on the said motions of the defendant, the opinion of the court is filed in the words following, to wit:

The denial of constitutional warrant for the statute authorizing the plaintiffs' copyright raises an important question. To justify this court in declaring the statute invalid, however, the fact should be reasonably free from doubt. Under the circumstances I think the question should be left to the court of review. The other points made are not sustained, and judgment must, therefore, be entered on the verdict.

42 And thereupon it is considered by the court here that the motions of the defendant for judgment for the defendant *non obstante veredicto*, as also for a new trial and in arrest of judgment for the plaintiff upon the verdict, be overruled; that a new trial be refused, and the reasons in support of said motions be dismissed.

And thereupon it is ordered, adjudged, and decreed that the plaintiffs, Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as well for the United States of America as for themselves, do have and recover of the defendant, Edward B. Thornton, the sum of fourteen thousand eight hundred dollars, together with their costs by them in this behalf expended.

43 And afterwards a bill of exceptions, duly signed by the honorable the judge of the court here, and an assignment of errors, with prayer for reversal of the judgment entered, being filed, are in the words and figures following, to wit:

44 In the District Court of the United States for the Eastern District of Pennsylvania, of November Sessions, 1880.

SCHREIBER *et al.* *vs.* THORNTON. } No. 39.

Be it remembered that in the said November sessions, A. D. 1880, came the said plaintiffs into the said court and impleaded the said defendant in a certain plea of debt, &c., in which the said plaintiffs declared (*prout* narr.) and the said defendant pleaded (*prout* pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the Honorable William Butler, district judge of the said district, on Tuesday, the seventeenth day of April, A. D. 1883, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impannelled (*prout* list of jurors); at which day came as well the said plaintiffs as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiffs agreed (*prout* agreement) with the counsel of the said defendant, and then read in evidence the testimony in the case of Schreiber *et al.* against Sharpless *et al.*, U. S. D. C., E. D. of Pa., May sessions of 1880, No. 19, from the stenographer's notes of testimony filed in that case, in accordance with the foregoing agreement between the parties in the present case, filed in the present suit on the seventeenth day of April, 1883, as follows:

45 Stenographer's notes of testimony in suit of Schreiber *et al. vs.* Sharpless *et al.*, U. S. D. C., E. D. of Pa. May sessions, 1880. No. 19.

GERHART SCHREIBER sworn and examined by Mr. BROWN:

Q. Mr. Schreiber, you are a member of the firm of Schreiber and Son?

A. I am, sir.

Q. What is your business, sir?
A. Photographer.

Certificate shown to the witness (which was afterwards offered in evidence, marked A, by Mr. Brown).

Q. Is this the certificate of the copyright, Mr. Schreiber, as received by you from the librarian of Congress?
A. Yes, sir.
Q. Did you cause to be mailed to the librarian of Congress two copies of that photograph after they were published?

(NOTE.—The photograph referred to was afterwards offered in evidence, marked D.)

A. Yes, sir.
Q. And you deposited them in the mail—where?
A. At our post office.
Q. At our post office here?
A. Yes, sir.
46 Q. They were properly stamped and addressed to the librarian of Congress, at Washington?
A. Yes, sir.
Q. After publication and prior to your receipt of that certificate you had sent the photograph to the librarian of Congress?
A. I had sent the photograph—two photographs—that is the law. I sent two photographs to be copyrighted in that shape, whereupon I received this copyright.

Cross-examined by Mr. HUNN:

Q. You say you are one of the members of the Schreiber firm?
A. Yes, sir.
Q. What are the names of your partners?
A. Francis Schreiber, Sr., Gerhart Schreiber, Henry Schreiber, and Conrad Schreiber.
Q. You are Gerhart?
A. I am, sir.
Q. Who was it took that photograph?
A. I was one of the parties that took it, with the aid of my brother.
Q. Which brother?
A. Henry.
Q. When was that?
47 A. I cannot say exactly; it was either in the latter part of March or it the beginning of April.
By the COURT: What year?
A. Last—well, of course, it was this year.

By Mr. HUNN:

Q. It was in 1880?
A. Yes, sir. I was a little perplexed at first.
Q. Where did you take this photograph?

A. At the old Ridge road depot—Ridge road street-car depot—I think it is 24th and Ridge road—Ridge avenue.

Q. It is 24th and Ridge avenue?

A. Yes, sir.

Q. Was any one of your firm present with you when you took it except yourself and your brother?

A. I don't know; I am not certain that there were any others of the firm there.

Q. Which brother was it?

A. Henry.

Q. No one but Henry and you?

A. No one else of the firm was present.

Q. I mean of the firm.

A. No one else of the firm was present.

Q. How did you take this photograph? Tell us slowly in your own way what you did.

48 A. I made a photograph negative by trying it about——

Q. You made a photograph negative by trying it?

A. Yes, sir; sixty or seventy times.

Q. Did you have more than one photograph apparatus present?

A. No, sir.

Q. Describe to us, Mr. Schreiber, the best way you can, the process by which it was made.

A. It was made by the regular wet process, as photographers call it, the collodion process. First, the negative is made.

Q. How was that negative made?

A. It was made with the aid of collodion silver and iron.

Q. It was made in the regular way that photographs, that all photographs, are made; by the same process, was it not?

A. Well, yes; but a little quicker than they usually are made; else we could never have got it.

Q. It was by the instantaneous process, was it not?

A. It was made by what we term "the instantaneous process."

Q. Is that instantaneous process patented?

A. No, sir.

Q. Or copyrighted?

49 A. No, sir.

Q. Did you make more than one negative?

A. Yes, sir.

Q. On that day?

A. Yes, sir.

Q. Is this picture which you have before you produced from more than one negative, or only from one negative?

A. This picture is produced from one negative.

Q. From only one negative?

A. Yes, sir.

Q. Which negative, in the order of the taking, was it that this was produced from?

A. I cannot say.

Q. How many did you take?

A. Between sixty and seventy.

Q. You made between sixty and seventy negatives, I understand you to say?

A. Yes, sir.

Q. The method by which you take this picture was by the aid of reflection?

—. ——.

Mr. HUNN:

Q. Mr. Schreiber, when you took this photograph away from there—when you took your photograph that you were satis-
50 fied with away from this depot—what did you then do with it?

A. I took it home and enlarged it.

Q. Now, tell us the size of that negative, please, as near as you can.

A. The original size of the negative?

Q. Yes, sir.

A. The original size of the negative is four by five inches.

Q. Now, you enlarged it?

A. Yes, sir.

Q. You took it away?

A. Yes, sir.

Q. And enlarged it?

A. Yes, sir.

Q. In enlarging it, when you say you enlarged it, you mean that you took a positive picture from that negative?

A. Yes, sir.

Q. How large did you make it?

A. I could make it any size I wanted.

Q. How large did you make it?

A. I think the size, as near as I can recollect, is 10 by 14 inches.

Q. The size of the positive picture was 10 by 14?

A. Yes, sir.

Q. What did you do with that positive picture?

A. I have the positive picture in my possession.

51 Q. Just as you took it then?

A. No, sir.

Q. Just tell us then what you did with it. What was the next thing you did with the picture in order to get it into the condition in which it is now?

A. We had it slightly retouched.

Q. You had the positive picture slightly retouched?

A. Yes, sir.

Q. By whom?

A. By the artist who does our work generally.

Q. Who is he?

A. There were three artists did that.

Q. Tell us who did it.

A. Am I compelled to tell their names, Mr. Hunn?

Q. Tell me, then, Mr. Schreiber, you had two negatives, *whey* they slightly retouched. *It* that it?

A. Yes, sir.

Q. Now, take one of those artists and tell me in what way he retouched it.

A. He took it and brushed or washed some ink over it; if it was in any way in places defective this will remedy it.

Q. One of these artists retouched it by taking a b-ush and washing ink on it?

52 A. Washing India ink on it, so as to remedy the little defects that may be in it and to make a good copy. The idea is to produce a picture that will give a nice copy.

The COURT: The object was to remedy the defects in color, did you say?

A. Not in color—oh, no; but if there is any deficiency or any indistinctness or anything of that kind then this is done.

Q. Now, this work that you are speaking of was done by one of these artists?

A. Yes, sir.

Q. By only one of them?

A. Only one of them.

Q. He was an artist?

A. Yes, sir.

Q. You say that he retouched it with India ink?

A. Yes, sir.

Q. Is he in your establishment?

A. No, sir.

Q. He is an artist doing business for himself, is he?

A. Yes, sir.

Q. Now, I do not want to misunderstand you. These three artists that you speak of all had something to do with this particular positive picture?

A. Yes, sir.

53 Q. Now, tell me what another one of these artists did?

A. One put in the ground-work.

Q. That was the artist that you have just been speaking about?

A. No, sir.

Q. Then another one put it in?

A. Yes, sir.

The COURT:

Q. What do you mean by another one? What did he do?

A. He put in the ground-work—the foreground—this part here (referring to the negative). One put in this and one put in that.

Mr. HUNN:

Q. You say that one of them put in this part (referring to the negative)?

A. Yes, sir; one put in part of it; he did not put in all that there; he just touched it up, so as to make it appear better.

Q. He finished the ground-work and the third one touched up the figures?

A. Yes, sir.

Q. Now, you have said these tufts in that part of the photograph

there was simply a ground-work. There was none of this—that has been put in by the artist?

54 A. Some of it has and some of it was there.

Q. Did you make more than one of these positive pictures on that one negative?

A. No, sir.

Q. That one which you made is the positive picture from which these photographs come?

A. Yes, sir.

Q. Now, from that positive picture you took another negative, do you not?

A. From that large positive—yes, sir.

Q. From that large positive?

A. Yes, sir; from that large positive I made a negative this size.

Q. You made a new negative and from that new negative you took this picture?

A. Yes, sir.

Q. Reduced in size?

A. Yes, sir.

Re-examined by Mr. BROWN:

Q. (Paper shown witness.) What do you know about that paper?

A. What do I know about this paper? After Mr. Sharpless had found out that he had done us a wrong——

The COURT: After you had found out?

The WITNESS: After he had found out he sent this paper

55 or this note by the boy to our place of business.

Mr. BROWN:

Q. Which of these pictures did you copyright, the large negative or this size here?

A. I copyrighted this and I copyrighted the original picture—the original small negative.

Mr. BREWSTER:

Q. You copyrighted the original small negative?

A. Yes, sir.

Mr. HUNN:

Q. What is the size of that?

A. It cuts out a picture about three and a half by three and a half inches square. That is made on a plate three and a half by five. Nobody else had a hand on it but ourselves.

Mr. BROWN:

Q. And this copyright applies to both?

A. Yes, sir; we copyrighted the two.

Mr. HUNN: He did not say that.

Mr. BROWN: What is the fact? Is that the same thing?

A. That is the same thing, with the exception that the original picture had the building in the rear.

The COURT: I understand this picture had been taken from
56 the artist's negative, made from the large positive which you had touched up?

A. Yes, sir.

Q. This was copyrighted?

A. This was copyrighted.

Q. And the original negative?

A. Yes, sir; the original small negative was also copyrighted.

Recross-examined by Mr. HUNN:

Q. You do not mean to say that this copyright upon which you are proceeding here and the paper which you have looked at refers to the original negative of three by four, do you?

A. No, sir.

The COURT: No, sir; it is this picture, as I understand it?

A. It is this picture.

Mr. HUNN: My friend said both, not the one. I want to get that clear; it has nothing to do with the original negative.

The COURT: I understand this picture to be the picture that Mr. Sharpless is charged with having lithographed?

Mr. VALENTINE: Yes, sir.

Mr. HUNN:

Q. But this copyright don't apply to the negative from which the large picture was taken?

A. No, sir.

57 Mr. HUNN: I want to ask one more question:

Q. You said you had this picture and you sent it to Washington after you had published it. What do you mean by "publishing it?"

A. I had the copies for sale; that is what I mean by "publishing."

Q. You had them for sale?

A. Yes, sir.

Q. They were exposed for sale?

A. Yes, sir.

Q. Before you sent this to Washington?

A. Yes, sir. I mean by "publication" that I had copies for sale, but they were not exposed for sale.

Q. They were not exposed for sale?

A. They were not exposed for sale before I sent the copy to Washington.

FRANCIS SCHREIBER, sworn and examined by Mr. BROWN:

Q. Mr. Schreiber, you are the brother of the Mr. Schreiber who was on the stand?

A. Yes, sir.

By Mr. BROWN:

Q. You are the brother of Mr. Schreiber?
A. Yes, sir.
Q. You are not, however, interested in this firm in any way at all?
58 A. No, sir.
Q. At the request of your brother did you call at the place of business of Mr. Sharpless?
A. Yes, sir.
Q. In company with whom?
A. My brother Henry.
Q. When?
A. On Saturday, the 8th day of May, in the forenoon.
Q. Where is their place of business?
A. At the corner of 8th and Chestnut streets.
Q. Who did you see—this defendant, Mr. Charles Sharpless?
A. Yes, sir.
Q. Now, Mr. Schreiber, be good enough to state every conversation that you had with him upon the subject of this copyright.
A. I went there on Saturday, the 8th day of May, with my brother Henry. We saw Mr. Charles Sharpless first. I spoke to him first. I told him I had come up to see him about the picture.

By Mr. HUNN (to the witness): Please identify the gentleman.
The WITNESS (to Mr. Hunn): That is the gentleman sitting there.
By Mr. HUNN (to the witness): Charles L. Sharpless?
By the WITNESS (to Mr. Hunn): Yes, sir.

59 By Mr. BROWN:

A. I asked him if he did not think he had done my brother an injury by infringing on the copyright of their pictures. He said no, he thought he had done them a good. I asked him where he got the pictures from, and he said his man who had charge had got it at Queen's. I asked him whether he did not see that it was copyrighted. He said a dry-goods man never looks at that. I told him it hurt my brothers considerably in their business. Well, he said he did not intend to do anything of that kind. I asked him whether he had any of them. He said, Yes, he had a great many of them upstairs. I asked him whether we could have them. He said, Yes, we could have the copies. That is all that I can remember.
Q. Was anything said about cambrics at that time?
A. I do not remember that he mentioned cambrics.
Q. Was anything else said?
By Mr. HUNN: I object to him saying what he thought.
A. I remember him saying that he thought it could do no
60 harm; that there was no harm in it; that he thought it would make a good label for their cambrics.
Q. How did he say that they were to be used?
A. If I remember rightly, he used the term "baby elephant cambric." I would not be positive that that was the word used, but I think it was.

Q. Did you get them at that time?
A. No, sir; I know that my brother went there.
Q. You sent your brother after them?
A. Yes, sir; my younger brother, Daniel, went there in the afternoon.
Q. Did you send him there?
A. I was present when my brother told him to go around. I did not see him go, but I know that he went.

Cross-examination by Mr. HUNN:

Q. This interview that you had with Mr. Sharpless was on the 8th day of May?
A. Yes, sir; it was on Saturday.
Q. What time of the day was it?
A. Well, it was some time in the forenoon; pretty close on to noon; I think it was near noon.
61 Q. What part of the store did you see him?
A. It was in the second story; I think it was in the second story.
Q. You are not positive of that?
A. It was almost in the centre of the room.
Q. You don't know whether it was in the second story or not?
A. I think it was in the second story, but I am not positive. I think it was the second story.
Q. Who was present?
A. My brother Henry and Mr. Sharpless; there was somebody else sitting there at a desk, but I don't know who it was.
Q. Your brother Henry and this gentleman—Charles L. Sharpless?
A. Yes, sir; he was sitting down. I don't know exactly whether it was on the desk; it looked more like a packing-box.
Q. When you addressed Mr. Sharpless was that your first interview with him?
A. Yes, sir; on that subject. I had spoken to Mr. Sharpless frequently before.
Q. Word had been sent, had it not, to Mr. Sharpless prior to your visit there stating that they had done you a wrong?
62 A. I don't know nothing about that—not of my own knowledge.
Q. How came you to go there?
A. I took an interest in the affair on account of my brother. I went up to see them, and they told me about it. Henry wanted to go around there, and I said I would go around with him.
Q. Henry was in the firm, was he?
A. Yes, sir.
Q. How did you open the subject to Mr. Sharpless?
A. I believe I commenced by saying that I came to see him about the picture—about the elephant picture.
Q. You went there to try to effect a settlement with Mr. Sharpless, didn't you?
A. No, sir; I had nothing to do with the settlement.
Q. Mr. Sharpless told you at that interview that if he had done

your brothers any wrong he would be very glad to make it right, didn't he?

A. Yes, sir; I remember him saying; a great many little things that was said there I do not mention here in the conversation.

63 Q. Oh, yes; that is so. I only wanted to remind you of that—that was all. How came you to ask Mr. Sharpless if he would surrender any of the pictures?

A. I wanted to know if he had any.

Q. Now, didn't you ask him if he would surrender these pictures to you with a view towards settling this matter after he said he would be very glad to do whatever was right?

A. No, sir.

Q. You only wanted to find out if he had any pictures?

A. Yes, sir; that was my object in going there.

Q. Your brother sent you there for that purpose, did he not?

A. He did not send me there. I proposed to go with him, with my brother, of my own accord. I generally go up to see them two or three times a week, and on this occasion I happened to go in when this subject was up, and my brother was going around there, and I said "I will go with you," because I thought it was better for two to go.

Q. Your brother was to find out whether Mr. Sharpless had any on hand; that was his object, was it not?

A. This was part of my object.

64 Q. Then you knew when you went there that there was a penalty of $1.00 for every picture found there, did you not?

A. No, sir; I did not know that. I knew it was a violation of the law and an infringement of the copyright. I did not know what the law was at that time.

Q. Did you say to Mr. Sharpless that the matter could be amicably settled?

A. I said once before that I mentioned nothing at all about settling.

65 HENRY SCHREIBER, sworn and examined by Mr. BROWN:

Q. You are one of the members of this firm?

A. Yes, sir.

Q. You were present with Francis Schreiber on this Saturday morning?

A. Yes, sir.

Q. Did you see Mr. Sharpless (pointing to him) at that time?

A. Yes, sir.

Q. Had you been there a few days before?

A. Yes, sir.

Q. Who did you see upon that occasion?

A. I saw Mr. Thornton.

Q. Mr. Thornton is employed there, to the best of your knowledge?

A. Yes, sir.

Q. He so stated to you?

A. Yes, sir.

Q. Where did you get that (showing witness a picture)?
A. I received that from Mr. Thornton.
Q. When and where?
A. On the third floor of Sharpless' establishment.
Q. And this was when you were there a few days before the interview with Mr. Sharpless?
A. Yes, sir.
Q. Where did Mr. Thornton get it?

66 A. He sent a young man about 10 steps from his desk to a shelf, and he brought a colored one first, and I asked him if he had not a plain one, and he sent the young man back.

Q. Look at that (showing witness another picture).
A. Yes, sir; he sent the young man back and brought me this.
Q. Did you see the place from which they were taken?
A. Yes, sir; it was a shelf.
Q. Could you tell whether there were others of them there at the time?
A. It looked to me as though there were.
Q. Just describe the appearance of the place from where he took that picture.
A. I was standing at the desk the same as this was, and this was about ten feet off from a shelf, or what seemed to be a counter; that was where he took them from.
By the COURT: Do you mean to say that he took them from a place that looked as though there were more there?
A. It looked to me that there were quite a package on the shelf; he took one of them off and handed it to me.
Q. Were the colored and the plain on the same package or in different packages?
A. They seemed to be in different packages.
Q. What did Mr. Thornton say when you asked him for this?

67 A. He said, "It is the same as yours." He knew me right away when I came up, he said. I bought two copies at Mr. McAllister's; he said it was the same as mine.

Q. What else did he say about it?
A. He said he had had it lithographed or copied from ours; that was all.
Q. Had you enquired for Mr. Sharpless on that day?
A. Yes, sir.
Q. Was he there?
A. No, sir; they said he was out of town, I believe, and they sent me to Mr. Thornton. I asked about the pictures and they sent me up to Mr. Thornton; they said he had charge of that.
Q. Now, on the Saturday when you saw Mr. Sharpless in company with your brother Francis, be good enough to state your recollection of the conversation that occurred.
A. Mr. Sharpless said he did not expect anything like that of us, to be stabbed in the back. I told him I did not think that we had stabbed him in the back; I said I thought it was the other way, that he had injured us. I had nothing at all to do with it. He

said he had nothing at all to do with it; Mr. Thornton has sole charge of it.

Q. He said to you that he had nothing at all to do with it?

A. Yes, sir; he said Mr. Thornton has the sole charge of
68 that, and he gets up the label, and gets everything that he thinks will be appropriate, or something to that effect. Mr. Sharpless himself said he was perfectly innocent. Well, I told him that the copyright was on it and our name was on it. Then he said, "A dry-goods man don't know anything more about a copyright than a child; they don't look at that; all they looked at was to make a nice label for their goods."

Q. That was all that Mr. Sharpless looked at?

A. No, sir; all the dry-goods man looked at. He said Mr. Thornton had got a couple of copies of Mr. Queen and had got a picture off Queen; bought it himself, without consulting him until the picture was done; he had then showed Mr. Sharpless the picture and he (Mr. Sharpless) thought it was very nice.

By Mr. HUNN:

Q. Who showed it to Mr. Sharpless?

A. Mr. Thornton.

By the COURT: Showed what picture to him?

A. The copy.

Q. The one that they had made?

A. Yes, sir; Mr. Sharpless said that he thought it would make a very nice label for the cambric.

By Mr. BROWN: Go on.

A. I believe that is all he said; he said go ahead. I be-
69 lieve that is all that was said about it; that he could go ahead with it; that Mr. Sharpless was pleased with it.

By F. C. BREWSTER, Esq.: It would make a nice label; to go ahead. That was what he said?

A. Yes, sir.

By the COURT: What do you mean to say; you have said two different things?

A. He said he had shown Mr. Sharpless this picture and Mr. Sharpless thought it was — very appropriate thing for the goods, and he was pleased with it, and said that he could go ahead with it.

By Mr. HUNN: That he had told Mr. Thornton to go ahead?

A. Yes, sir; that is what I understood Mr. Sharpless to say.

By Mr. BROWN: Did you see any of the copies there at that time?

A. No; not at that time.

Q. Did you have any conversation with Mr. Sharpless as to where they were?

A. He said they had a lot upstairs and I could have them all. He said that I knew that Mr. Sharpless did not intend to injure us by this thing. He said that I knew that. It old him that I thought he was innocent in the matter. He did not think he was doing us an injury, but he had done us an injury nevertheless, but he
70 thought that he had done us good to distribute this picture.

Q. After that you left, did you?
A. Yes, sir.
Q. When did you next see him?
A. That same day.
Q. After your brother?
A. I sent Daniel right down for the pictures.
Q. After Daniel came back did you see Mr. Sharpless?
A. Mr. Sharpless said——
Q. Never mind what Mr. Sharpless said. After Daniel came back did you go to see Mr. Sharpless?
A. Yes, sir.
Q. What conversation did you have with him then? Just state under what circumstances you had the conversation and what it was.
A. Just as I came in he looked at the clock and said, "I have not got much time; we will talk going up the street." Then he put on his overcoat and we went up together up 8th street. He said, "I will deliver those pictures and we will call it —, and that would settle the whole affair." I told him I thought our loss was so great that it would not be any more than right that he should compensate
71 us with a little money. He answered with, "Henry, I will never give thee a cent."
By Mr. HUNN: He said he would deliver those pictures up and that would settle the affair?
A. Yes, sir.
By Mr. BROWN: What did he say about the number of them?
A. He did not say.
By the COURT: Did he say anything more?
A. He said he would see me on Monday, and jumped into a car.
Q. Was that notice on those pictures when they left your place of business?
A. Yes, sir; every one.

Cross-examination by Mr. HUNN:

Q. Are you one of the firm of Schreiber & Co.?
A. Yes, sir.
Q. You said that you went upstairs to Mr. Thornton, and Mr. Thornton gave you such a paper—such a paper as you have there—with the photograph of the baby elephant on it and some printing?
A. Yes, sir.
Q. You say that he got it from a certain place?
A. Yes, sir; about ten feet from his desk.
72 Q. Now, you don't mean to say that you saw any others there like that, do you?
A. I saw a good big pile of paper, and this was taken off the top. I suppose, as they were all of the one size, they were all the same thing?
Q. I don't want to know what you supposed, I want to know what you saw; you don't mean to say that picture was taken off a pile of pictures just like that?
A. Yes, sir; I am almost positive.

Q. Do you swear to that that it was?
A. I would swear to that conscientiously; yes, sir.
Q. How near were you to that pile?
A. Within about ten feet.
Q. That was a- near as you went?
A. Yes, sir; it might have been more and it might have been less.
Q. Did you see on that pile any other picture like that, or is that the only one you saw?
A. I saw another one, but the other one was not like that.
Q. Did you see there, on that pile, or off that pile, or anywhere, any other picture like that?
A. The distance was so great that you could not say positively that they were all pictures, but the papers were all of that size, and there was a pile there.
73 Q. You say there appeared to be a pile of papers; now, I want you to answer my question, Did you see any printing, or photograph, or view, or any picture like that on the pile?
A. I don't think any person could see from where I was.
Q. Did you or did you not?
A. No, sir; not on that pile.
By the COURT: You only saw the pile of paper?
A. I only saw the one the young man took off and brought to me.

By Mr. HUNN:

Q. You did not see any other like this on the pile; is that your answer?
A. Yes, sir.
Q. Now, did you see any other anywhere in that room, exactly like that?
A. No, sir.
Q. You did not?
A. No, sir.
Q. Did you see any other picture like the other one while you were there; (showing the witness a photograph) did you see any other picture like that while you were in the room?
A. No, sir.
Q. You did not?
A. No, sir.
Q. And all you saw then was a pile of what appeared to be paper?
A. Yes, sir.
74 Q. And these were on top?
A. Yes, sir.
Q. You said you went there for the purpose of making a settlement with Mr. Sharpless, didn't you?
A. I don't know as I did; no, sir.
Q. If you did not go there for the purpose of making a settlement why did you ask how many they had?
A. Why did I ask?
Q. Yes, sir.

By the COURT: State what your object was.

A. I wanted to see how many they had, that was all; and what quantities they had made.

By Mr. HUNN:

Q. Why did you ask if they would surrender what they had?

A. I did not ask them to surrender them?

Q. Did not your brother ask them if they would surrender them in your presence?

A. I don't remember.

Q. You were present at the whole interview with your brother, were you not?

A. Yes, sir.

Q. You heard all that was said?

A. Yes, sir.

Q. Then why did you send down afterwards to get them?

75 A. Because Mr. Sharpless said he would give them to me.

Q. Did not Mr. Sharpless say he would surrender them to you in response to a question of yours whether he would give them up?

A. How is that?

Q. You say that Mr. Sharpless said he would surrender them to you?

A. Yes, sir.

Q. It was after you or your brother asked if he would surrender them?

A. I do not recollect our asking if he would surrender them. I don't think I asked individually if he would surrender them, but Mr. Sharpless said he would let us have all the pictures that he had.

Q. Have you not already told us, Mr. Schreiber, that you asked Mr. Sharpless if he would deliver up what he had—have you not already said that?

A. I don't recollect; I may have asked him, but I don't remember it.

Q. You told him that you thought he ought to compensate you with a little money?

A. Yes, sir.

Q. Did you say how much?

A. No, sir.

By the COURT: That conversation was in the street?

76 A. Yes, sir.

Q. That was at the second conversation?

A. Yes, sir.

By Mr. HUNN:

Q. Didn't you say to him that he ought to compensate you and pay you well for the injury he had done?

A. No, sir.

Q. What did you say?

A. I said he ought to compensate us with some money, and he

says, "Henry, I will never give thee a cent;" and jumped in the car and said, "I will see you on Monday."

Q. You did not say that he ought to give you a little money?

A. I said he ought to give us some money.

Q. I believe you said "a little money" awhile ago?

A. I might have said it.

Q. Now, Mr. Sharpless told you at one of these interviews—I think the second one—that Mr. Thornton had done this—had obtained this copy?

A. Yes, sir.

Q. That the Messrs. Sharpless had nothing to do with it?

A. Yes, sir.

By the COURT: I understand that this was a conversation that took place with Mr. Sharpless in his first interview, when Mr.
77 Sharpless said he had nothing to do with it and knew nothing about it, but that Mr. Thornton, he was informed, did it?

A. Yes, sir.

By the COURT: He did not know anything about it until Mr. Thornton shewed him these pictures and told him about it?

A. Yes, sir; that's right.

By Mr. HUNN:

Q. You told him that you thought the Messrs. Sharpless were innocent?

A. Yes, sir. He said to me, "I am perfectly innocent, and you know it." I said I thought so myself, in doing us a wrong he did not think he was doing us a wrong; but I said, "You have done us a wrong nevertheless."

Q. How many negatives were originally made of this thing—you were one of the parties who went out to make them?

A. Yes, sir.

Q. How many negatives were made out of the plates?

A. I suppose between 60 and 70 were exposed.

Q. Did you not tell Mr. Sharpless at one of these interviews
78 that there were only 30 negatives made?

A. No, sir; I told him there were between 30 and 35 plates made; there were two on each plate.

Q. Do you call them all negatives?

A. Yes, sir.

79 DANIEL SCHREIBER, sworn and examined by Mr. BROWN:

Q. Are you a member of this firm?

A. Yes, sir.

Q. You are employed with them?

A. Yes, sir.

Q. Did you, at the request of your brother, see Mr. Sharpless on this Saturday morning?

A. Yes, sir.

Q. Did you state the object of your business?

A. Yes, sir.

Q. What did you say?

A. I told him that my brother had sent me to get the pictures that he had promised to give him, and he said he would not surrender them to us; he said that he wanted to see my brother Henry.

Q. And this you reported to your brother?

A. Yes, sir.

Cross-examined by Mr. HUNN:

Q. When was it?

A. It was on Saturday the 8th day of May.

Q. Did he say why he would not surrender them?

A. No, sir.

80 Q. What was it you said about seeing your brother?

A. I reported it to my brother.

The COURT: He just said that Mr. Sharpless said that he would not surrender them.

A. Yes, sir; he said he would not surrender them. He said he wanted to see my brother Henry.

Q. He wanted to see your brother—what for?

A. He said he wanted to see my brother. He did not say what for.

Q. Your brother Henry sent you there?

A. My brother sent me there.

Q. When he told you to get these pictures he said you were to obtain them in full settlement, did he not?

A. No, sir.

Q. Mr. Sharpless told you that he wanted to see your brother Henry before he handed them over to him; am I right?

A. I believe you are right; yes, sir.

Q. Did you see Mr. Sharpless after that?

A. No, sir.

Q. Did Henry see him after that?

A. I don't know, sir.

Q. When you had these interviews yourself with Mr. Sharpless, demanding the pictures, the district attorney had been consulted, had he not?

81 A. I don't know anything at all about it.

Q. Did you have any conversation with Henry after you left Mr. Sharpless?

A. I told him what Mr. Sharpless told me; that is all, and what I have told you.

Q. What did he say?

A. He did not say anything, except to say, "All right."

Q. Did you know when you went there what was the penalty for interfering with a copyright?

A. I had heard something about it, that it was unlawful.

Q. You had heard that from your brother?

A. Yes, sir.

Q. Did you hear what the penalty was?

A. No, sir.

EDWARD B. THORNTON, sworn and examined by Mr. BROWN:

Q. Are you employed by Sharpless & Sons?
A. Yes, sir.
Q. How long have you been in their employ?
A. Since October 8th, 1875.
82 Q. What are your duties there, sir?
A. I am manager and buyer of the wholesale domestic department.
Q. Did you procure a copy of a picture of an element similar to that inquired of in this suit?
A. Yes, sir.
Q. From whom?
A. McAllister's.

By Mr. BREWSTER: That is the photograph in evidence.
By Mr. BROWN: Yes, sir.

Q. At McAllister's, on Chestnut street, in this city?
A. Yes, sir; below 8th.
Q. What did you do with it, Mr. Thornton?
A. I took it to the establishment of Ketterlinus & Co., northwest corner Fourth and Arch.
Q. Go on and state what you caused to be done.
A. They being the lithographers and the parties that do our printing—that is, our tickets for goods—I gave it to Mr. Ketterlinus, the junior member of the firm—the youngest one.
Q. The party who is here?
A. Yes, sir.
By the COURT: Go on and say whether you had it lithographed.
A. I asked them if they would copy that it would suit me
83 for a ticket for a trade-mark for domestic goods called cambric. They said they could make it very near like it, but they could not copy it exactly like it. I told them to do the best they could with it. I thought it would be a very nice ticket for the purpose. They gave it to their artist, I understand, that they have there in the building, and he made it exactly, and showed me the proof of it in a few days following. After I went there I approved of it and ordered ten thousand tickets, or what they called labels for goods.

(Paper shown to witness afterwards offered in evidence, marked B.)

Q. Tickets similar to those?
A. Yes, sir.
Q. You ordered ten thousand of those tickets?
A. Yes, sir.
Q. How many did you order of the other?

(NOTE.—The paper referred to in the question and answer, being a circular, was afterwards offered in evidence, marked C.)

A. I gave no order for those.
Q. Did you subsequently give an order for those?
A. Yes, sir.

Q. For how many?

A. 5,000.

Q. There were ten thousand of the colored and five thousand of the plain?

A. Yes, sir.

84 Q Were those copies delivered to Sharpless & Sons?

A. They were. Four thousand five hundred were delivered to James Martin & Company, dyers and finishers, at Richmond, and the balance was delivered to Sharpless & Sons.

Q. How much was the balance?

A. There was four thousand five hundred delivered to the dye-works.

Q. That would be ten thousand five hundred in all?

A. There were only ten thousand ordered—four thousand five hundred delivered.

Q. Fifteen thousand in all of both kinds?

A. Yes, sir.

Q. So that there were ten thousand five hundred of both kinds delivered?

A. Yes, sir; in all.

Q. And those that were delivered to Sharpless & Sons, which you spoke about, was the order for ten thousand?

A. We have a few over; we send them, too. We have a surplus sometimes. I would say there were ten thousand two hundred of the tickets; the order was only for ten thousand. They generally have a few over, and they run them off.

Q. So that ten thousand seven hundred came to Sharpless; ten thousand two hundred were delivered, and you sent to James

85 Martin and Company, to his dyeing establishment, forty-five hundred, and the balance were sent to Sharpless & Sons; so that makes in all ten thousand seven hundred that were delivered to Sharpless and Sons?

A. Yes, sir.

By Mr. BROWN: How many were distributed?

A. Which way?

Q. Distributed on your goods or left in the possession of those in charge of your establishment?

A. We had 2,800 pieces of goods ticketed with this ticket.

By the COURT: Just give us generally how many of those you distributed; tell us that.

A. The idea is this, your honor: The tickets are put on the goods first at the dyeing establishment. We receive them afterwards and sell them to other parties. The goods had a ticket like that on them.

By Mr. BROWN:

Q. Then you received them all from the dyeing establishment afterwards?

A. Yes, sir.

Q. And you sold or distributed to your trade two hundred pieces?

A. Yes, sir.

By the COURT: Do you mean to say that you only distributed two hundred copies?

A. Two hundred pieces, with this label.
Q. Of that kind?
A. Yes, sir.
86 Q. How many of the other?
A. Of those we distributed about the same amount.
Q. About two hundred of each?
A. Yes, sir.
By Mr. BROWN: Do you remember the visit of Henry Schreiber to your place?
A. I do not remember him by name.
Q. The person who was on the stand?
A. There were three on the stand.
Q. Were you present when one of them was there?
A. Yes, sir.
Q. That circumstance occurred?
A. Yes, sir.
Q. How many had you on hand at that time?
A. The balance remaining from the order of ten thousand seven hundred.
Q. Where were they—on the shelf?
A. No, sir; they were locked up.
Q. They were locked up at that time?
A. Yes, sir; in a chest.
Q. Where was the chest?
A. On the third floor of the building.
Q. The others were where?
A. The circulars were on the shelf in the forepart of the building facing on Chestnut street.
Q. Did you know how they were paid for?
A. No, sir.
87 Q. Do you know what they cost—the cost of them. How much did they cost?
A. The labels here cost ten dollars per thousand.
Q. The tickets you mean?
A. We call them labels.
Q. What did the others cost?
A. The circulars cost $4.50 per thousand.
Q. They were paid for by whom?
A. Sharpless & Sons.
Q. Do I understand you properly that a certain amount was sent to the dye-s?
A. Yes, sir.
Q. And the dyers delivered them to Sharpless & Sons?
A. Yes, sir.
Q. When they came back to Sharpless and Sons on the goods?
A. Yes, sir.
Q. Making fifteen thousand two hundred in all?
A. Yes, sir.
Q. There were two hundred over?
—. ——.

Cross-examination by Mr. HUNN:

Q. Who first conceived the idea of having a picture of the baby elephant put on the goods of Mr. Sharpless?

A. I did.

Q. Do you remember when that was done, as near as you can tell?

88 A. April 8th.

Q. Did you consult Messrs. Sharpless about it or any of them?

A. No, sir.

Q. What did you do towards putting that conception into some form?

By the COURT: Just state what you did.

A. Well, am I to state——

By Mr. HUNN: What was the first thing you did towards obtaining that paper for an advertisement?

A. What I did was originally, in the first place, of my own idea of having an elephant. Before I had any knowledge of having an elephant——

By the COURT: We don't care about that. Just go on and state in answer to Mr. Hunn's question. You say that you conceived the design of placing this upon the goods. What did you do towards carrying that design out?

A. I had a lithograph made.

Q. You got a picture first?

A. Yes, sir; I got a picture first.

By Mr. HUNN: Let us keep to the facts. You did not have it lithographed until afterwards. I want to know, after you first got the idea, what did you do about it?

A. I went out into the market to buy a picture of an elephant of some description.

89 Q. Now, didn't you first, before you did that, didn't you go to Ketterlinus?

A. Yes, sir.

Q. You went to Ketterlinus before you went to buy a picture?

A. Yes, sir.

Q. Now, tell us what you went there for?

A. I went there with that idea and explained what I wanted.

Q. Try and tell us what was done without telling us what was said. You went there with that idea in your head; what did you go there for?

A. To get a ticket made of an elephant.

Q. Did you get one made there?

A. I did.

Q. Was that the one in question—was that the figure we have here?

A. Not in the first instance; there was two prior to this one; they had given me a sketch.

Q. Then when you went to Ketterlinus with the idea of the elephant in your head it was in order to get a sketch or something for a ticket made there?

A. The first visit I made there I did not get one—not a satisfactory one.

Q. They gave you a sketch which was not satisfactory?

A. Yes, sir.

90 Q. You got one which was not satisfactory, but which was not this one?

A. No, sir.

Q. What then?

A. I went out into the market to purchase a picture of an elephant; going down Chestnut street I saw the photograph I had here a few minutes ago.

Q. Where did you see it?

A. I saw it exposed for sale in McAllister's window. I went in there and asked the price of it and was told it was thirty-five cents. I purchased it; it struck me as being a good picture of an elephant, something in reality being on exhibition at the time.

Q. That picture has on it the words "Entered according to act of Congress?"

A. Yes, sir.

Q. Did you know what it meant?

A. Yes, sir.

Q. Did you know it was copyrighted by the reading of it?

A. Yes, sir.

Q. You knew, then, when you bought it that it was a copyright picture?

A. Yes, sir.

Q. What did you do with it?

A. I took it to the establishment of Ketterlinus & Co., at the corner of Fourth and Arch streets.

91 Q. Did you leave it there?

A. I did.

Q. For what purpose?

A. For the purpose of having it copied for a ticket for cambrics.

Q. Was it copied there?

A. It was.

Q. Have you a copy with you?

A. I have a copy of the ticket; yes, sir. (Ticket shown.)

Q. Is that the one?

A. Yes, sir.

Q. What about the other one?

A. They are both the same place.

Q. Had you at the time you left it there—this photograph to be copied—had you then told Mr. Sharpless anything of it?

A. No, sir.

By the COURT: Or any member of that firm?

A. No, sir.

By Mr. HUNN:

Q. You had not told any one of the firm of Messrs. Sharpless and Sons anything about it?

A. No, sir; I never communicated anything to anybody outside of Ketterlinus.

Q. You have told no one?

A. No, sir.

Q. You said that so many thousand copies were delivered by Ketterlinus to the concern. How long afterwards?

92 A. After what time?

Q. After you had ordered them how long were they in delivering them?

A. The- delivered the tickets on April 26th; they delivered the circulars on May 1st.

Q. Now, when they delivered these tickets and circulars to Sharpless and Sons, had you then indicated to any of the firm anything about them; had you up to that time, before they were delivered by Ketterlinus, informed the firm, or did the firm know anything about them?

A. No, sir.

Q. Then the delivery of these articles by Ketterlinus & Co. to Sharpless & Sons was done, as all the ordering and printing had been done, without the knowledge of the firm?

A. Yes, sir.

Q. Now, when did the Messrs. Sharpless & Sons, or any of them, first know that there were such copies as that at their place of business—that it, that these pictures were there?

A. Messrs. Sharpless & Sons knew of this being in their establishment after the first goods were delivered from the dye-works of James Martin & Co.

By the COURT: Then you say that Mr. Sharpless, including

93 all the members of the firm, had no knowledge of this previous to that?

A. The firm had no knowledge of this previous to April 27th.

Q. When these goods came from the dyers?

A. These tickets were on the goods ready for sale on the 27th of April, before any member of the firm knew it.

Q. That is, the goods were for sale; you do not mean to say the lithographs were for sale?

A. No, sir; we put them on as trade-marks; we never sell the tickets.

Q. Were any goods sent away with tickets on them before the firm was aware of it?

A. They were in the store on that day.

Q. Was it on that day Mr. Sharpless first discovered it?

A. Yes, sir; I took a piece of goods down and showed them the tickets on the goods.

Q. When was that?

A. On the 27th day of April.

By Mr. HUNN:

—. You took a piece of goods down to whom?

A. To Charles L. Sharpless.

Q. On the 27th day of April?

A. Yes, sir.
Q. With what ticket on it?
A. One of these tickets. (Witness shows ticket.)
94 Q. On what?
A. On the goods.
Q. Did you show the photograph that you had bought?
A. Yes, sir.
Q. At that time?
A. At the same time.
By Mr. HUNN: You showed Mr. Sharpless the photograph at the same time?
A. Yes, sir.
Q. One of these that you have there?
A. A duplicate of that.
Q. Were any of these goods sent out after that?
A. Yes, sir.
Q. Did you tell Mr. Sharpless anything about these tickets being copyrighted—the photograph of the baby elephant being copyrighted? Did you discuss that in any way?
A. No, sir.
By the COURT: You say that you showed him that picture, though?
A. Yes, sir.
By Mr. HUNN: You are positive about having shown him the photograph on that day?
A. Yes, sir.
Q. Tell us what your business was then at that store of Sharpless & Sons.
A. I was employed there as the superintendent of the whole-
95 sale domestic department; I have the purchasing of all the goods, the making of the price, and seeing that they are sold.

By Mr. HUNN:

Q. You have said that these lithographs or prints were paid for by the Messrs. Sharpless and Sons. Now, were they paid for in what way?
A. I don't know.
Q. You do not know that they were paid for?
A. No, sir.
Q. Then when you said that Messrs. Sharpless had paid for these pictures you were mistaken?
A. No; when I say that they are paid for I take into account the fact that I do the purchasing for them. I do not know exactly the terms they sell their goods on, but I think we generally buy them to be paid for 30 days after date. You ask me whether they were paid for; I would say that I never saw the receipt. They were contracted for by me and supposed to be paid for by Sharpless & Sons when the bill was sent to them.
Q. The whole thing was done without ever consulting anybody?
A. It was without their knowledge.

96 JOHN L. KETTERLINUS, sworn and examined by Mr. BROWN:

Q. What is your business?
A. Lithographer.
Q. At Fourth & Arch streets?
A. Yes, sir.
Q. Did you cause a copy of that photograph to be lithographed at your establishment?
A. Yes, sir.
Q. Tell us all about it?
A. Mr. Thornton gave us a photograph like that. His instruction was to make a copy of it and we did so.
Q. You delivered to him how many copies?
A. We delivered to him five thousand on the first of May of the circulars, and ten thousand two hundred of the cambric tickets on the 26th of April.
Q. They were similar to those copies which are there before you?
A. Yes, sir.
Q. Were they paid for?
A. Yes, sir; they were paid for.
Q. By whom?
A. By Sharpless and Sons.
The COURT: How were they paid for; do you mean to say they were paid for personally or by check?
97 A. They sent a boy down with the money, and credit was given to their account.

Mr. VALENTINE:

Q. Was it paid in cash or by a check?
A. I don't know.

Mr. BREWSTER:

Q. You sent the bill to them?
A. I guess the bill was sent to them.
Q. And a boy came with the cash?
A. Yes, sir.

Cross-examined by Mr. HUNN:

Q. These copies, those lithographs which you call them—the prints—you say were all taken from those photographs—one of those photographs, or one like them—which was left at your place. Am I right; what do you say about that; what was left at your place; what do you know?
A. This lithograph was brought to us, and it was drawn on a stone.
Q. This lithograph?
A. This photograph was brought to us.
Q. What did you do?
A. We drew with a crayon on stone this picture.
Q. You drew with crayon on a stone a copy of it?
A. Yes, sir; a copy of it.

98 Q. Who do you mean by we?

A. I mean that I employed a man to do that kind of a thing.

Q. You mean a man in your employ?

A. Yes, sir.

Q. Have you the stone still?

A. Yes, sir.

Q. Who does that stone belong to?

A. The stone belongs to me; the drawing belongs to Sharpless & Sons. I cannot use it for anybody else.

Q. Now, Mr. Thornton brought these photographs to you, didn't he?

A. Yes, sir.

Q. Did he see you personally?

A. Yes, sir; he did.

Q. He talked with you about making a copy without saying that he came from Sharpless & Sons, didn't he?

A. Well, he never said that.

Q. I am asking what he said on this occasion?

A. He didn't say anything, except he said he wanted a ticket got up.

Q. What were his exact words?

A. He said, "I want a ticket got up like this."

Q. Did he say he wanted a ticket got up like this?

A. Yes, sir; I don't think he said exactly like that.

Q. What did he say?

99–101 A. He had a drawing or a draft made. We made it for him a week or so previous. He did not like it altogether, so he brought this photograph, and he said he would like to have a better-looking elephant than what we made before.

Q. And he left it?

A. And he left it; yes, sir.

Q. Now, from that stone on which the crayon drawing was made the impressions which you have before you were taken, were they?

A. No, sir; these were taken from the transfer.

Q. How was the transfer made?

A. It was made and then transferred to paper.

Q. You had that?

A. Yes, sir.

Q. That was made in your place?

A. The paper was not made in our place. We buy the paper. The impression was made there, and it was transferred on stone so as not to spoil the original. That is the usual way we make these tickets.

Q. Those tickets you have there were made by you and sent to Sharpless & Sons. They were all made in your place?

A. Yes, sir.

102 Q. Now, you said that these things were paid for by Messrs. Sharpless' boy, who was sent down. Do you know whether they have been paid for or not? Can you say now, of your own knowledge, whether they have been paid for at all?

A. Yes, sir; they have been paid for.
Q. You are positive that they have been paid for?
A. Yes, sir.
Q. State how you know that.
A. At the end of the month I know what bills are outstanding.
Q. You mean to say that if they had not been paid for your attention would have been called to it?
A. Yes, sir.
Q. You don't know whether cash was sent or a check was sent?
A. No, sir; I don't know that.
Q. You don't know whether the money was sent in cash or by check, and you don't know who sent it?
A. No, sir; I don't.
Q. But you believe you have been paid?
A. Yes, sir.

103 DANIEL WUEST, sworn and examined by Mr. BROWN:

Q. You are employed with Ketterlinus & Co.?
A. Yes, sir.
Q. You are a lithographer?
A. Yes, sir.
Q. Did you make a plate from which these were printed?
A. I made a drawing.
Q. The drawing was made? Was it a photograph similar to that?
A. Yes, sir.
Q. After that there was a plate made?
A. Yes, sir.

Cross-examined by Mr. HUNN:

Q, What is your first name?
A. Daniel.
Q. You made a drawing from that photograph, and from that all those which are here were printed, and it is similar to the elephant on the photograph?
A. It is a direct copy of that, as near as it was possible to make it. That was what I was told to do.

Mr. BREWSTER:

Q. You made it from this photograph as near as possible?
A. Yes, sir.

104 By Mr. HUNN:

Q. You had this photograph then in your possession when you copied it?
A. Yes, sir.
Q. Did you know at the time it was copyrighted?
A. Yes, sir; I took notice that there was a copyright on it.
Q. Did you suppose that you were breaking the law when you were copying it? Why did you copy it?
A. I was ordered to do so.

Exhibit "B"

OUR BABY "AMERICUS"

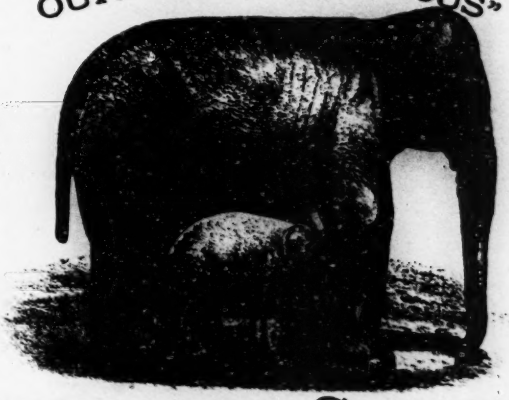
CAMBRICS

SUPERIOR QUALITY
Glove Finish

No.____ ____Yds.

NOTICE!

OUR BABY "AMERICUS"



"ELEPHANT CAMBRIC"

Only 6 cts. Nett-60 Days.

Gents: *From the enclosed samples we solicit your order and call your special attention to the Quality and Finish of this New Cambric, as it has been carefully selected and manufactured on the Extra Quality of No. 60 Print Cloth, and comprises all of the New and desirable shades for the coming season, as follows:*

Black,	Medium Pearl,	Medium Garnet,
Dark Slate,	Light Pearl,	Dark Pink,
Medium Dark Slate,	Dark Ash Rose,	Light Pink,
Medium Slate,	Medium Ash Rose,	Dark Coachman's Drab,
Medium Light Slate,	Dark Gendarme Blue,	Medium Coachman's Drab,
Light Slate,	Light Gendarme Blue,	Light Coachman's Drab,
Drab Slate,	Medium Blue,	Old Gold Drab,
Light Drab Slate,	Light Blue,	&c., &c., &c.

N. B.—All Orders received will have prompt attention, and Goods carefully selected.

SHARPLESS & SONS,

801, 803, 805 and 807 Chestnut St., Philadelphia.

Exhibit "C"

Entered according to Act of Congress, in the year 1880, by Schreiber & Sons, in the Office of the Librarian of Congress, at Washington.

THE MOTHER ELEPHANT 'HEBE' AND HER BABY 'AMERICUS.

The first one known to have been born in captivity in the world.
Born at Philadelphia, U. S., March 10th, 1880. The property of COOPER & BAILEY.
Keeper in charge, Prof. GEO. ARSTINGSTALL.
Instantaneous Photograph from life, by SCHREIBER & SONS, Philadelphia.
Published by GILBERT & BACON, Philadelphia.

Exhibit "D"

Q. By whom?
A. By Louis Ketterlinus.

And thereupon the plaintiff- offered in evidence (1) the certificate of the copyright of the Librarian of Congress, which is annexed hereto, marked A; (2) one of the tickets ordered by Thornton and lithographed by Ketterlinus, marked B; (3) one of the circulars ordered by Thornton and lithographed by Ketterlinus, marked C; (4) one of the plaintiffs' copyrighted photographs hereinbefore referred to, marked D, all of which are attached hereto and form part of this bill of exceptions.

105 No. 6041*h*.

LIBRARY OF CONGRESS, *Copyright Office, Washington,* } *To wit:*

Be it remembered that on the 17th day of April, anno Domini 1880, Schreiber & Sons, of Philadelphia, have deposited in this office the title of a photograph, the title or description of which is in the following words, to wit:

The mother elephant, "Hebe," and her baby, "Americus," the first one known to have been born in captivity in the world.

A. Born at Philadelphia, U. S., March 10th, 1880, the property of Cooper & Bailey, the right whereof they claim as proprietors, in conformity with the laws of the United States respecting copyrights.

[SEAL.] (Signed) A. R. SPOFFORD,
Librarian of Congress.

Two copies of the above publication deposited Apr. 17, 1880.

I, Ainsworth R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress.

In witness whereof I have hereto set my hand and affixed the seal of my office this 7th day of June, 1880.

[SEAL.] A. R. SPOFFORD,
Librarian of Congress.

106 And the counsel for the defendant did, thereupon, at the end of the testimony, present then and there the seventeen points (*prout* defendant's points for charge), and the learned court did then and there reserve the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth points (as so marked on the margin of said points), and did then and there refuse to charge the jury as therein requested in the twelfth, fourteenth, sixteenth, and seventeenth points, and did then and there affirm the thirteenth point, and did charge the jury as therein requested, and did then and there say that the eleventh and fifteenth of said points were inapplicable, since the claim for exposing to sale was withdrawn.

107 And the defendant did then and there except to the charge of the said court and the refusal by the court of defendant's points, and filed the following exceptions, viz:

The defendant excepts to the charge of the learned court where it says:

"The court instructs you that under the evidence if you believe it, and the court sees nothing that would justify disbelief, the plaintiff is entitled to recover and to have damages assessed at the rate of one dollar ($1.00) for every sheet of that copied photograph found in his possession, and every sheet under his control at the time must be treated as in his possession, notwithstanding the interest his employers may have had in it."

And also where it says:

"A large number of the copies, according to the testimony, were upon a shelf."

And also where it says:

"And he obtained these copies for the purpose of labels. They were found in the store where he was and under his charge."

108 And also where it says:

"Now, I repeat what I have said, that every sheet under his control (then under his control)—notwithstanding the interest that the firm of Sharpless & Sons may have had in them—every sheet thus subject to his control must be regarded, for the purposes of this suit, as in his possession, and for every sheet thus found in his possession, if you find for the plaintiff-, and I see nothing that would justify you in not so finding."

And the defendant further excepts because the learned court refused all of the defendant's seventeen points, as presented, except those marked reserved.

And the jury thereupon rendered their verdict in favor of the plaintiffs for the sum of fourteen thousand eight hundred dollars, with costs; and the defendant did then and there move the court in arrest of judgment for the plaintiff- upon the verdict, and thereupon filed his reasons therefor (*prout* reasons for arrest of judgment),

109 and the defendant did then and there move the court to enter judgment for the defendant *non obstante veredicto* on the points reserved, and filed his reasons therefor (*prout* the said reasons), and the learned court then and thereupon refused to arrest the said judgment for the plaintiff-, and thereupon dismissed the said reasons in arrest of judgment, and the learned court then and there also refused to enter judgment for the defendant on the reserved points, and thereupon the said court entered judgment for the plaintiff- upon the said verdict.

110 And the learned court then and there filed an opinion (*prout* opinion).

And thereupon the counsel for the said defendant did then & there except to the answers of the court to the said points presented by the defendant, and did then and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the

aforesaid judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this nineteenth day of June, A. D. 1883.

WM. BUTLER, *Judge.* [L. S.]

111 *Assignments of Error and Prayer for Reversal of Judgment.*

The defendant below files the following assignments of error, viz:

I. The learned court charged the jury (*inter alia*) as follows:

"The court instruct you that under the evidence, if you believe it, and the court sees nothing that would justify disbelief, the plaintiff is entitled to recover and to have damages assessed at the rate of one dollar for every sheet of that copied photograph found in his possession, and every sheet under his control at the time must be treated as in his possession, notwithstanding the interest his employers may have had in it."

"A large number of the copies, according to the testimony, were upon a shelf."

"And he obtained these copies for the purpose of labels. There were found in the store where he was and under his charge."

112 "Now, I repeat what I have said, that every sheet under his control (then under his control), notwithstanding the interest that the firm of Sharpless & Sons may have had in them, every sheet thus subject to his control, must be regarded, for the purposes of this suit, as in his possession, and for every sheet thus found in his possession, if you find for the plaintiff, and I see nothing that would justify in not so finding."

II. The learned cuort reserved and afterwards refused the following points presented by the defendant below, viz:

First. Section 4965 of the Revised Statutes is unconstitutional in so far as it imposes a penalty upon any person who violates a copyright secured to "a proprietor."

Second. The said section is unconstitutional in so far as it attempts to secure a copyright to "the proprietor" of the photograph in question.

Third. The said section is unconstitutional in so far as it attempts to secure to any person or persons a copyright of such photo-

113 graph as the photograph in question.

Fourth. The engraving complained of as a copy is not an illegal interference with the plaintiffs' rights, whatever they may be, in the photograph in question.

Fifth. The entry of the alleged copyright by the plaintiffs claim more than they, as applicants for copyright, were entitled to in the subject of their claim, and is for this cause void.

Sixth. If the photograph in question could be copyrighted at all this could be done only by pursuing all the provisions relating thereto contained in the Revised Statutes.

Seventh. The section 4965, in so far as it refers to a forfeiture or penalty, is to be construed strictly and literally, and not by inference or implication; nor is it to receive equitable construction.

Eighth. The plaintiffs, having brought their action in the names of more than one person, cannot recover.

Ninth. The first clause of commission in the section declared upon, viz., the one reading as follows, "Shall engrave, etch, work,
114 copy, print, publish, or import," cannot be implied to parties who are not the actual and original engravers, etchers, workers, copiers, printers, publishers, or importers.

Tenth. The only clause of commission in the section declared upon — is applicable to this case is the clause reading as follows, viz: "Or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid;" and unless you can bring the defendant under this clause you cannot convict him at all.

III. The learned court below refused the following points presented by the defendant below:

Twelfth. If you believe from the testimony that the photograph in question, as attempted to be copyrighted, was not the exclusive and original work of the Schreibers, plaintiffs herein, your verdict must be for the defendant.

Fourteenth. If you believe from the testimony that the
115 photograph, as attempted to be copyrighted, was finished or in any degree or respect the work of a person or persons other than the said Schreibers, your verdict must be for the defendant.

Sixteenth. Under the testimony as presented the defendant should not be convicted.

Seventeenth. Consent being essential to guilt, an unintentional violation of a penal law does not incur the penalty.

IV. The learned court below refused to enter judgment in favor of the defendant on the points reserved.

V. The learned court below entered judgment in favor of the plaintiff on the verdict.

VI. The learned court below refused to arrest the judgment, notwithstanding the defendant filed the following reasons therefor, viz:

First. Because the plaintiffs' narr. does not aver that the plaintiffs, before publication, delivered at the office of the librarian of Congress or deposited in the mail, addressed to the librarian at
116 Washington, District of Columbia, a printed copy of the title of the photograph for which they desired a copyright.

Second. Because the plaintiffs' narr. does not aver publication of the photograph.

Third. Because the narr. does not aver that within ten days from the publication thereof the plaintiffs delivered at the office of the librarian of Congress or deposited in the mail, at Washington, District of Columbia, two copies of such photograph.

Fourth. Because the plaintiffs' narr. does not aver that the plaintiffs or any of them were or are citizens of the United States or residents therein.

Fifth. Because a *qui tam* action does not lie where part of the penalty is given to the informer, not to whoever will sue for it, and the narr. lays the action as a *qui tam* action.

Sixth. Because more persons than one are joined as common informers in the narr.

117 Seventh. Because the action is not brought in the name of the United States, although no other mode is provided by statute.

Eighth. Because the plaintiffs' narr. does not allege the offence was committed against the statute.

And the defendant prays that the judgment entered in this cause in the said court may be reversed.

June 22, 1883.

HUNN,
For the Defendant.

118 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the record and proceedings in the said court in a certain action of summons debt therein lately depending, wherein Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, who sue as well for the United States of America as for themselves, are the plaintiffs, and Edward B. Thornton is the defendant, as full and entire as the same now remain of record in said court.

In testimony whereof I have hereunto subscribed my hand & affixed the seal of the said district court this 29th day of September, 1883, and in the 10- year of the Independence of the said United States.

[SEAL.] W. W. CRAIG,
Pro Clerk.

119 UNITED STATES OF AMERICA, } sct:
Eastern District of Pennsylvania, }

The President of the United States to the judge of the district court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons, who sue as well for the United States of America as for themselves, plaintiffs, and Edward B. Thornton, defendant, in a plea of debt, a manifest error has intervened to the great damage of the said Edward D. Thornton, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record

120 and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania for the third circuit, sitting at Philadelphia, in the State of Pennsylvania, on the first Monday of October next (1883), that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourth day of May, A. D. 1883, in the 107th year of the Independence of the said United States.

[SEAL.] W. VON A. WILLIAMSON,
Pro Clerk of Circuit Court U. S., East. Dist. of Penna.

121 (Endorsed:) No. 1. October sess., 1883. Circuit court United States, east. dist. of Penna. Edward B. Thornton, plaintiff in error, *vs.* Francis Schreiber *et al.*, defendants in error. Writ of error issued by the circuit court.

Brought into the clerk's office of the district court U. States for the district by Mr. Hunn, counsel for defendant.
May 4th, 1883.

C. S. LINCOLN,
Clerk Dist. Court.

122 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

To Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as well for the United States of America as for themselves, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, to be holden at Philadelphia on the first Monday of October next (1883), pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein Edward B. Thornton is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 22nd day of June, A. D. 1883.

WM. BUTLER, *Judge.*

123 (Endorsed:) No. 1. October sess., 1883. C. C. U. S., E. D. of Pa. Thornton, pl'ff in error, *vs.* Schreiber *et al.*, def'ts in error. Citation.

Brought into the clerk's office of of the district court June 22nd, 1883.

C. S. LINCOLN,
Cl'k Dist. Court.

PHILA., *June* 22, '83.

I accept service of the within citation and waive all further notice of the same.

A. SYDNEY BIDDLE,
For Schreibers.

124 And afterwards, to wit, on the 5th day of May, 1884, this cause being called for argument, and the counsel for the respective parties being present, the same is argued on the record of the district court *sur* writ of error, and the court being now fully advised in the premises it orders the judgment of the district court be affirmed.

Whereupon the judgment of the district court is affirmed.

125 And afterwards, to wit, on the 16th day of May, A. D. 1884, the parties aforesaid, by their counsel, come into our said court here and file the following agreement, to wit:

U. S. C. C. Oct. Sess., 1883.

EDWARD B. THORNTON, Pl'ff in Error,
vs.
FRANCIS SCHREIBER, Sr., *et al.*, Def't- in Error. } No. 1.

And now to wit, May 16th, 1884, the parties hereto, with the consent of the said court, agree that the record be amended, so that it shall stand as if the district judge had affirmed the plaintiff in error's sixth and seventh points instead of reserving them in the court below, and that the said points shall be marked "affirmed" instead of "reserved," and the exceptions filed by the defendant in the court below to the learned judge's disposition of the said
126 points are hereby withdrawn.

HUNN,
Pro Pl'ff in Error.
A. SYDNEY BIDDLE,
For Defendants in Error.

Endorsed: Oct. Sess., '83. No. 1. U. S. C. C. Thornton, pl'ff in error, *vs.* Schreiber, Sr., *et al.*, def'ts in error. Agreement. Filed May 17, 1884.

127 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

October Sess., 1883.

THORNTON, Plaintiff in Error,
vs.
SCHREIBER *et al.*, Defendants in Error. } No. 1.

Know all men by these presents that we, Edward B. Thornton, Charles W. Sharpless, and Henry W. Sharpless, are held and firmly bound unto Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, in the

full and just sum of five hundred dollars, to be paid to the said Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-seventh day of June, A. D. 1884.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between Edward B. Thornton, plaintiff in error, and Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as well for the United States of America as for themselves, defendants in error, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the
128 said defendant, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Edward B. Thornton shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD B. THORNTON. [SEAL.]
HENRY W. SHARPLESS. [SEAL.]
CHAS. W. SHARPLESS. [SEAL.]

Sealed and delivered in presence of—
JAMES E. CLARK.
W. VON A. WILLIAMSON.

Sureties approved.

WM. BUTLER, *Judge.*

[Endorsed]: No. 1. October sess., 1883. Circuit court United States. Thornton *vs.* Schreiber *et al.* Bond *sur* writ of error. Fled July 1, 1884.

129 UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Edward B. Thornton, plaintiff in error, *vs.* Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber and Sons, who sue as well for the United States of America as for themselves, defendants in error, October sess., 1883, No. 1, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of C. C.

[Endorsed:] No. —. — sessions, 188–. Circuit court United States, eastern district of Pennsylvania. Certified copy.

Endorsed on cover: E. Pennsylvania, C. C. U. S.. No. 137. Edward B. Thornton, plaintiff in error, *vs.* Francis Schreiber, Sr., Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, trading as Schreiber & Sons. Filed 18th October, 1884.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 137.

EDWARD B. THORNTON, PLAINTIFF IN ERROR,

vs.

SCHREIBER ET AL., DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Eastern District of Penpsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN G. JOHNSON,
Counsel.

Edward B. Thornton, Plaintiff in Error,

vs.

Schreiber et al., *Defendants in Error.*

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

ABSTRACT OF THE CASE.

The plaintiff in error was the defendant in the court below. He was "manager and buyer of the wholesale domestic de-"partment" (page 31) of Sharpless Brothers; a firm which, in the city of Philadelphia, carried on a large wholesale and retail dry-goods business. His occupation was also described (page 37) as being "Employed there as the superintendent of "the wholesale domestic department, having the purchasing "of all the goods; the making of the price, and the seeing "that they were sold."

The defendants in error were photographers.

In the year 1880 a baby elephant was born in the city of Philadelphia, which was called "Americus." Its mother was known as "Hebe." In the latter part of March or in the beginning of April, 1880, two members of the plaintiffs' firm photographed these two elephants standing together. The manner in which they did this is described on pages 16, 17, 18, 19, and 20 of the record.

They took a large number of negatives, and then selected from the whole number one which was satisfactory to them. They detailed no posing or arrangement, but simply, so far as the proof shows, used a mechanical process in the ordinary way. From the negative selected, as above stated, they made what they called a "positive," on an enlarged scale. Three artists not of their establishment, worked upon this "positive." One retouched it, another put in the ground-work; and the third touched up the figures. From this "positive," thus altered, a small negative was made, and from this was taken the photograph (Exhibit D), which was alleged to have been infringed. Copyrights of the photographs taken from the original, and from this second negative, were secured. There was no infringement of the photograph taken from the original negative.

The steps taken by the plaintiffs to secure the copyright are stated on page 15. The certificate of the Librarian of Congress is set out on page 4. The *narr.* did not, in detail, aver what was done, but simply averred that "the said Francis Schreiber, Sr., "Gerhard Schreiber, Henry Schreiber, and Conrad Schreiber, "trading as Schreiber & Sons, citizens of the said United "States, heretofore, to wit, on the seventeenth day of April, "1880, were the proprietors of a certain photograph which "had been duly copyrighted by them upon the full compli-"ance by them with the provisions of the act of Congress in "such case made and provided, to wit, on the seventeenth "day of April, 1880, and the title of the same, to wit, the "mother elephant 'Hebe" and her baby 'Americus,' the first one "known to have been born in captivity in the world, born at "Philadelphia, United States, March 10th, 1880, the property "of Cooper & Bailey, was then and there duly recorded with "the Librarian of Congres, according to the provisions of the "act of Congress in such case made and provided."

Thornton had conceived the idea, (page 34), of having a label made for a certain kind of cambrics sold by Sharpless Brothers, to be called the "Elephant Cambric," which should contain the picture of an elephant. He went to a large lithographic establishment in Philadelphia, called the "Ketter-

"linus Printing Establishment," owned and conducted by Ketterlinus & Co., and requested them to make a picture of an elephant. This they did, but with the one shown to him by them he was not pleased, whereupon he purchased from a dealer in such articles a photograph which had been taken from the Schreibers' second negative, upon which photograph there was a notice that a copyright therefor had been secured. This photograph he handed to Mr. Ketterlinus "for the pur-" pose of having it copied for a trade-mark for cambrics." (Page 35.) Thus far he acted under what he deemed his general authority from Sharpless Brothers, but without any special instruction from the firm, or from any of its members, and in fact without any of them knowing what he had done. The lithographer of Ketterlinus & Co. made a drawing which was as exact an imitation as was possible of the plaintiffs' photograph. From this a picture on stone was made by Ketterlinus & Co. Upon the order of Thornton, the latter printed for Sharpless Brothers ten thousand two hundred copies of a label which contained this picture in color, and five thousand copies of a circular which contained it not in color. All of these were subsequently paid for by Sharpless Brothers (page 38), although the firm had no knowledge of the order nor of the printing, until after the labels and circulars had been delivered to their store and to their dyer. The dyer pasted several thousand of the labels on the cambrics dyed by him, and sent the goods thus labeled to the store of the firm, on or about the twenty-sixth day of April, 1880. Several thousand of the labels not affixed to goods were sent directly to the store by Ketterlinus & Co. The circulars, which were intended for gratuitous distribution, were also sent to the store on the first day of May, 1880. The labels were not intended to be sold. They were meant to be used as a *quasi* trade-mark upon the cambrics. Only four hundred of the total number of the prints were ever distributed. The residue remained at the store of Sharpless Brothers from the time of the first delivery to them until long after suit was brought. The circumstances connected with the delivery of the labels and circulars are stated on pages 21, 22, 23, 24, 25, 26, 28, 30, 31, 32, 33, 36, and 37

of the record. The first knowledge the firm of Sharpless Brothers acquired of what had occurred, was on the twenty-seventh day of April, 1880, when Thornton explained to one of the firm what had been done, and showed to him the original photograph which had been copied by Ketterlinus & Co.

A few days prior to the 8th of May, 1880, one of the Schreibers (page 33) went to Sharpless's store, and was shown by Thornton a copy of the label, and also of the circular. The bulk of the labels and of the circulars were then in the store; either on a shelf, or in a drawer locked up.

On the eighth day of May, 1880, some of the plaintiffs called on a member of the firm of Sharpless Brothers. The details of this interview, and of a later one, are given by the plaintiffs on pages 21, 23, 25, 28, and 30. Mr. Sharpless then acknowledged: "We have a great many of them (viz, of the "labels and circulars) up stairs. I asked him whether we "could have them. He said, yes, we could have the copies." (Page 21.) "He" (Sharpless) "said they had a lot up stairs, "and I could have them all." "He" (Sharpless) "said he "would deliver these pictures and we would settle the affair." (Page 28.)

The plaintiffs were not content to receive the pictures, but they insisted upon money being paid to them by Sharpless Brothers, who refused to do more than to surrender the copies in their possession. Suit was brought, first, against Sharpless Brothers, and later, against Thornton.

The action in the court below was a *qui tam* action for the penalty specified in section 4965 of the Revised Statutes, by the four members of the Schreiber firm, against Thornton. The *narr.* originally contained four counts, but the third and fourth were withdrawn before trial. The first and second counts differed only in this: That the first count averred that Thornton did "*copy and print* the said photograph," and that on the eighth day of May, 1880, fifteen thousand sheets of the same were found in his possession; whilst the second count averred that Thornton did "*publish* the said photograph," and that fifteen thousand sheets of the same were on the eighth day of May, 1880, found in his possession. Both

counts averred, in the same terms, the proprietorship of the photograph, and, partially, the manner of securing the copyright thereof.

The defendants pleaded "not guilty."

At the trial various points (pages 9, 10, and 11) were presented by the defendants; but all, saving a few which do not appear in the assignments of error, were either refused in the first instance, or, were reserved for subsequent consideration, and were finally overruled. The court charged, *inter alia*, in the words set forth on page 42. To the answers to the defendants' points and to this charge of the court, exceptions were duly taken.

A verdict was entered in favor of the plaintiff for $14,800.

A motion in arrest of judgment was duly made. The reasons in support thereof are to be found on pages 11 and 12. A motion for judgment for defendant, *non obstante veredicto*, was also made. The reasons in support of this motion appear on pages 12 and 13.

All these motions were overruled, and judgment was entered in favor of the plaintiffs upon said verdict.

This judgment was sustained by the Circuit Court, to which a writ of error was taken.

The case is now in this court for alleged error in the answers of the court below to defendants' points, and in its charge to the jury; and also for alleged error, in the refusal of a motion in arrest of judgment, and a motion for judgment in favor of the defendant, *non obstante veredicto*.

Section 4965 reads thus:—

"SEC. 4965. If any person, after the recording of a title of any map, "chart, musical composition, print, cut, engraving, or photograph or "chromo, or of the description of any painting, drawing, statue, statuary, "or model or design intended to be perfected and executed as a work of "the fine arts, as provided by this chapter, shall, within the term limited, "and without the consent of the proprietor of the copyright first obtained "in writing, signed in the presence of two or more witnesses, engrave, "etch, work, copy, print, publish, or import, either in whole or in part, "or by varying the main design with intent to evade the law, or, know-"ing the same to be so printed,, published or imported, shall sell or ex-"pose to sale any copy of such map or other article, as aforesaid, he "shall forfeit to the proprietor all the plates on which the same shall be

"copied, and every sheet thereof either copied or printed, and shall "further forfeit one dollar for every sheet of the same found in his "possession, either printing, printed, copied, published, imported, or "exposed for sale; and in case of a painting, statue or statuary, he shall "forfeit ten dollars for every copy of the same in his possession, or by him "sold or exposed to sale; one-half thereof to the proprietor and the other "half to the use of the United States."

ARGUMENT FOR PLAINTIFF IN ERROR.

The assignments of error will be discussed under the head of several propositions.

I. The court below erred in instructing the jury that under the evidence the plaintiffs were entitled to recover, and in overruling the motions in arrest of judgment, and for judgment in favor of defendant, because :—

(A.) The *narr.* disclosed no title in the plaintiffs, either as authors of the photographs, or as assignees of the authors, which entitled them to a copyright, and there was no evidence that they were the sole authors of the photograph copyrighted, or that they were the assignees of those who were.

(B.) The *narr.* did not aver, and the evidence failed to show, that the photograph was of such a character as was entitled to a copyright.

(C.) The plaintiffs failed to show that they had delivered at the office of the Librarian of Congress, or deposited in the mail addressed to him, a printed copy of the title of the photograph for which they desired a copyright.

(D.) The plaintiffs failed to show that, within ten days after the publication, two copies of the photograph were thus delivered or deposited.

II. The *narr.* was defective in not averring the matter specified under subheads C and D.

III. If the photograph, as attempted to be copyrighted, was not the exclusive and original work of the Schreibers, but was finished by, or if it was in any degree the work of, other persons, the plaintiffs were not entitled to recover.

IV. A person, who, acting on behalf of an employer, though the employer may not, at the time, know what is being done, orders to be made for such employer, copies of a copyrighted photograph, by an independent manufacturer who does the copying and delivers the copies to the employer's establishment, does not, within the meaning of section 4965 of the Revised Statutes, " copy, print, or publish " such photograph.

V. Copies of such copyrighted photograph, thus ordered by such employé and delivered by the lithographer to the store of his employer who pays for the same and takes possession thereof, are not in the " possession " of the employé within the meaning of said section.

PROPOSITION I.—SUB-POINT A.

The present action was for the recovery of a penalty. It was necessary that the declaration should disclose a title to the copyrightable matter, which, it was averred, had been infringed upon. The act of Congress gives to the " Proprietor " of a photograph the right to copyright the same, and the *narr.* simply averred that the plaintiffs were the proprietors of the photograph. Mere proprietorship, however, is not sufficient. The act is only intended to protect the *author* or the assignee of the author. If it covers any other proprietorship, it is unconstitutional. Congress never meant to give to every person who showed title in himself to a photograph, power to secure copyright therefor; but it meant to protect the author or the assignee of the author of what alone was copyrightable, namely, the idea, the grouping, the pose, or the design. If the plaintiffs were merely proprietors of the photograph, and not of the idea or of the design, they were not entitled to a copyright nor to any penalty. In averring simply that they were proprietors of the photograph, they failed to aver enough to justify their suit. Every person who gratifies his vanity by ordering his own photograph, becomes the owner thereof; but he acquires no right to demand a copyright of the same.

The evidence did not disclose such a proprietorship in plaintiffs of the idea, or design—of the copyrightable idea, if any

such there was—as entitled them to any copyright of the photograph. They secured two copyrights—one of the photograph taken from the first negative, which was their own work exclusively, and the other of the photograph produced by the negative taken from the "positive," which was the result of the labors of three independent artists not connected with plaintiffs' establishment, though paid by plaintiffs for their work. (Pages 16, 17, 18, 19, and 20.) In paying these artists for their work, the plaintiffs acquired no right to the copyrightable idea. There was no pretense that this was ever assigned to them. The workman who constructs a patentable machine in hours of labor paid for by his employer has no right to the machine constructed; but the employer acquires no right to secure for himself a patent therefor. These artists may have been foreigners, not entitled to a copyright. In this connection we refer to the well-reasoned decision of Brown, D. J., in Yuengling *vs.* Schile, 12 Fed. Reporter, 97–105.

PROPOSITION I.—SUB-POINT B.

There was no averment in the declaration of any authorship of such an idea, design, or pose, as was copyrightable. There was a bare averment of proprietorship in plaintiffs of a photograph, and of nothing more. There was no averment that this photograph was not the result merely of a mechanical process.

Under Saroney's case, in 111 U. S., 53, the plaintiffs were only entitled to recover by proving that the photograph was the visible embodying of some original idea of theirs. This, under any state of proof, however strong the same might be, was a question which it was the duty of the judge to submit to the jury for its decision. It was not one which the court was entitled to find, or as to which it could give a binding charge.

In fact, however, there was no evidence of anything sufficient to justify a submission to the jury to find originality of idea. The first negative was the result of instantaneous photography. There was no proof of any posing, or of any original design. Several negatives were taken, and the plaintiffs chose the one which suited them best.

From this negative, as we have said, a large "positive" was taken. This was retouched and altered by three outside artists, not by the plaintiffs. The importance or nature of these alterations was not shown with any particularity.

This court has fairly laid down the law as to the extent of the power of Congress to confer copyright. The keynote was struck in 1882, in the Trade Mark Case, 100 U. S., 82, in this language:—

"The writings which are to be protected are the fruits of "*intellectual labor* embodied in the form of books, prints, en- "gravings, and the like," &c.

The full scope of the power of Congress was stated in the Saroney Case (Burrow Giles Co. *vs.* Saroney, 111 U. S., 53), where the court below had found: "The plaintiff about the "month of January, 1882, under an agreement with Oscar "Wilde, became and was the author, inventor, designer, and "proprietor of the photograph in suit, the title of which is "'Oscar Wilde No. 18,' being the number used to designate "this particular photograph and of the negative thereof; "that the same is a truthful, new, harmonious, characteristic "and graceful picture, and that said plaintiff made the same "at his place of business in said city of New York and "within the United States entirely from his own original "mental conception, to which he gave visible form by posing "the said Oscar Wilde in front of the camera, selecting and "arranging costumes, draperies, and other accessaries in said "photograph, arranging the subject so as to present graceful "outlines, arranging and disposing the light and shade, sug- "gesting and evoking the desired expression, and from such "disposition, arrangement, or representation made entirely by "the plaintiff, he produced the picture in suit, and that the "terms 'author,' 'inventor,' and 'designer,' as used in the art "of photography and in the complaint mean the person who "so produced the photograph."

It was said:—

"We entertain no doubt that the Constitution is broad "enough to cover an act authorizing copyright of photographs "so far as they are representatives of original intellectual con- "ceptions of the author."

This court dealt with the argument that photography was a mechanical process, saying: "this may be true in regard to "the ordinary production of a photograph, and further that "in such a case a copyright is no protection;" pointed out the importance, when the supposed author sues for a violation of his copyright, that the existence of those facts, "originality "of intellectual production of thought and conception on the "part of the author should be proved;" and said that in the case then decided this had been done, and that the photograph then before it had been shown "to be an original work "of art," the product of plaintiff's intellectual invention, of "which the plaintiff is not the author."

The reference in the Saroney Case to Nottage *vs.* Jackson, 11 Q. B. D., 627, where it was held that the man who actually took the photograph, and not the owners of the establishment which employed him, was the author, is of importance in considering sub-point A.

We may take it as settled that there should be sufficient originality and invention in the making of a photograph to entitle an author to a copyright therefor; but that the burden is upon the plaintiff, who claims a copyright, to satisfy the tribunal, which must find the fact, that there was such originality and invention. Where an issue is to be tried by a jury it is not proper to allow them to find such originality and invention if there is no sufficient proof, and it is of course improper to take the point away from them by a binding instruction that no such proof is required.

PROPOSITION I.—SUB-POINT C.

There was no proof before the jury that a printed copy of the title had been sent to the Librarian of Congress before *publication* of the photograph. The only oral evidence under this head is to be found on pages 15 and 20, and is to the effect that two copies of the photograph were mailed to the Librarian of Congress after publication of the photograph. The certificate of said librarian appears on page 41. Such certificate may, or may not, be evidence of the points therein stated; but it is not deemed necessary here to discuss that

question. Conceding that it is evidence of the truth of such facts, it says nothing as to whether there had or had not been a publication of the photograph prior to the mailing of the title thereof. It would seem, from an examination of the certificate, that the deposit of the title, and of the two photographs, was on the same day, viz., 17th April, 1880. If the plaintiff, Gerhart Schreiber, (page 15), was right in answering in the affirmative the question, "Did you cause to be mailed to the "Librarian of Congress two copies of that photograph after "they were published?" he must also have mailed the title after said publication.

PROPOSITION I.—SUB-POINT D.

There was no evidence as to the date of publication of the photograph and none as to the fact of mailing the two photographs "within ten days" of said publication.

PROPOSITION II.

The discussion of sub-points C and D of proposition I. involves also the discussion of this proposition. It is submitted that the plaintiffs were not entitled to recover in a penal action for infringement of an alleged copyright unless the declaration averred performance by them of all the things which the statute made prerequisite to a right to recover.

The need of such averments in the declaration itself has been considered and maintained by the Circuit Courts in various cases. See

Rosenbach *vs.* Dreyfuss, 2 Federal Reporter, 217;
Chicago Music Company *vs.* Butler Paper Company, 19 Federal Reporter, 758.

PROPOSITION III.

We have discussed this proposition in discussing proposition I. sub-point A.

We have already stated that the photograph actually copyrighted was taken from a "positive" which represented the work of three artists, who never assigned to the plaintiff, so far as there is any proof in the case, and who were not shown to

have been citizens of the United States nor otherwise entitled to secure a copyright.

Under the evidence the defendant was entitled to an affirmation by the court of his twelfth and fourteenth points.

Can it be contended that if several persons are the authors of a work one of them may assume to be the sole proprietor and may recover upon a copyright taken in his own name? If he is the author of a part he is not entitled to a copyright for the whole. Had there been proof that the co-authors or co-photographers were entitled to copyright and had assigned the same to the plaintiffs, defendant's point might have been refused as being too broadly put; but, in view of the fact that there was an utter absence of any such proof, the points should have been affirmed as they were drawn.

PROPOSITION IV.

There should have been no recovery against Thornton, unless he copied, printed, or published, the photograph in question. Did he do so?

Though he was acting beyond the scope of his authority, still he was professing to act, and was intending to act, in the interest of his employers, Sharpless Brothers. He expected to derive no profit to himself from the labels and circulars which he ordered upon their account. True, he ordered the copy to be made; but the act punishes, not the one who causes the copy to be made, but the one who actually does make it. The crime penalized is the copying, and the copying was not done directly, or indirectly, by Thornton. All the work of copying was done by Ketterlinus & Co., at an independent establishment. They did it with a full knowledge of the fact, which appeared on the face of the photograph they copied, that it had been copyrighted. See evidence of Ketterlinus (pages 38, 39, and 40), and of Wust, his lithographer, page 40. The man who orders a copy to be made by one who acts in an independent employment cannot be said himself to do the copying, more than can the owner, who contracts with a shipwright for the construction of a vessel, be said to build the vessel. Between the actual doing by A of a thing,

the doing of which is penalized, and the doing of said thing by a third person at the request of A, there is a wide difference. The law of principal and agent does not apply where we are discussing responsibility for a penal offence.

If it be said that an infringer may escape all ill consequences to himself by procuring the illegal act of infringement to be done by another, we answer :—

1. Such escape, if it results from a correct reading of the law, cannot be prevented.

2. The amount of the forfeiture is made dependent upon the number of the copies which may be found in the possession of a defendant, and not upon the fact of infringement. If no copies be found, though ever so many may have been sold, the infringer cannot be penalized.

3. The civil liability for damages can be enforced against the person who causes the infringement.

When, in framing the act of 1831, it was meant to punish the person who caused the act to be done as well as the one who did it, Congress so enacted. By the sixth section of that act a penalty was imposed upon "any person who shall print, "publish, or import, or cause to be printed, published, or im- "ported any copy, &c., who shall forfeit fifty cents for every "sheet of such matter which had been printed, published, or "procured to be published," &c.

PROPOSITION V.

No copies of the photographs were found in the possession of the defendant. They were all in the store of Sharpless Brothers, who had paid for them. The labels and circulars were on cambrics belonging to that firm, or were on their shelves, or were locked up in their building. They were not even shown to have been in the custody of the defendant, who was the mere employé in the store in which they were found. They were not delivered to him, but were delivered directly to the firm or to their dyer. Before suit was brought, application had been made by the plaintiffs to that firm, who had admitted their possession and had agreed to deliver the copies. The only reason why such delivery was not made was because

plaintiffs were not willing to accept it without some money compensation being paid to them. For the testimony under this head, see pages 21, 22, 24, 25, 26, 27, 28, 30, 31, 33, 36, and 37.

Were copies paid for by the employers; delivered to them; deposited in their store; affixed, in many cases, upon their goods; and acknowledged by them to be in their possession, in the possession of their employé Thornton, whose duty was that of "manager and buyer of the wholesale domestic "department"?

In a suit against Sharpless Brothers, if it had been shown that after hearing the photograph copied had been copyrighted they had exposed the copies in the shape of labels and circulars for sale, could they, successfully, have resisted a recovery by setting up a possession in Thornton and not in themselves? If they could not, how can there be a recovery against Thornton as being the possessor, at the same time, of such goods?

To recover against Thornton it was necessary to prove, first, that he had copied the photograph, and, secondly, that the copies were in his possession. They were not his property, because they had been ordered for the employers and had been paid for by them. They had been delivered to them at their place of business. They were not upon the person of Thornton, but were on his employers' shelves or upon their goods or in their drawers locked up. They were not shown to have been even in his custody.

In the English statutes the words used were, "Which shall "be found in his, her, or their custody." See the argument of counsel in Backus *vs.* Gould, 7 Howard, 805. In copying that statute in 1790 our Congress used the word "posses-"sion" instead of "custody."

"Possession" is defined by Webster to be "the having, "holding, or detention of property in one's power or com-"mand; actual seizin or occupancy, ownership whether right-"ful or wrongful."

Bouvier thus defines possession: "The detention or enjoy-"ment of a thing which a man holds or exercises by himself, "or by another who keeps or exercises it in his name."

"By the possession of a thing we always conceive the con-
"dition in which not only one's own dealing with the thing is
"physically possible, but every other person dealing with it is
"capable of being excluded. Thus the seaman possesses his
"ship, but not the water in which it moves, although he makes
"each subserve his purpose.

"Actual possession exists where the thing is in the imme-
"diate occupancy of the party. 3 Dev., 34.

"Constructive possession is that which exists in contempla-
"tion of law, without actual personal occupation. 11 Vt., 129.
"And see 1 McLean, 214, 265; 2 Bla. Com., 116.

"In order to complete a possession, two things are required:
"That there be an occupancy, apprehension or taking; that
"the taking be with an intent to possess (*animus possidendi*)."

The whole subject of what constitutes possession has been discussed in so masterly a manner by Stephens in his Digest of Criminal Law, page 195, article 281, that we will close the argument with a full quotation from his observations:—

"A movable thing is said to be in the possession of a person when he 'is so situated with respect to it that he has the power to deal with it as 'owner to the exclusion of all other persons, and when the circumstances 'are such that he may be presumed to intend to do so in case of need.

"A movable thing is in the possession of the husband of any woman "or the master of any servant, who has the custody of it for him, and "from whom he can take it at pleasure. The word 'servant' here in-"cludes any person acting as a servant for any particular purpose or "occasion.

"The word 'custody' means such a relation towards the thing as "would constitute possession if the person having custody had it on his "own account.

"If a servant receives anything for his master from a third person, not "being a fellow-servant, he has the possession as distinguished from the "custody of it until he has put it into his master's possession by putting "it into a place or thing belonging to his master, or by some other act of "the same sort, whether the servant himself has or has not the custody "of that place or thing.

"If a servant receives anything belonging to his master from a fellow-"servant who has received it from their common master, such thing con-"tinues to be in the possession of the master unless the servant who "delivered it delivered it with the intention to pass the property therein "to the servant to whom it is delivered having authority to do so from "the master.

"If a servant receives anything belonging to his master from a fellow-"servant who has received it on the master's account and has done no "act to put it into the master's possession, it is in the possession of the "servant who so receives it and not in his custody merely."

ILLUSTRATIONS.

A, the master of a house, gives a dinner party. The plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants.

Founded on 1 Hale P. C., 506.

A is clerk to B, a banker. Money is paid to A on B's account. A keeps it for a short time and then puts it into the till. The money is in A's possession till it is put into the till, when it passes into B's possession, though A may have the custody of it.

Bazeley's Case, 2 Leach, 835.

B sends his servant A with a cart of B's to fetch coal for B from C. A receives the coals from C, carries them in sacks on his back to the cart, puts them into the cart and drives it back to B. The cart is throughout in B's possession but A's custody. The coals are in A's possession whilst he is carrying them on his back to the cart, but as soon as they are deposited in the cart they are in the possession of B though both coals and cart continue to be in the custody of A.

R. *vs.* Reed, Dear., 168, 257.

JOHN G. JOHNSON,
For Plaintiff in Error.

Supreme Court of the United States.

No. 137. October Term, 1887.

Edward B. Thornton,
Plaintiff in Error,

vs.

Schreiber *et al.*,
Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief for Defendants in Error.

H. P. BROWN,
J. R. PAUL,
A. S. BIDDLE,
J. K. VALENTINE,
U. S. Dist. Att'y.

BRIEF FOR DEFENDANTS IN ERROR.

The argument for the plaintiff in error may be conveniently divided into five heads, as follows:—

A. The sufficiency of the plaintiff's declaration.

B. The sufficiency of the evidence.

C. The meaning of sections 4952 and 4965 of the Revised Statutes of the United States (Rev. Stat. U. S., 957–9), and the constitutionality of these sections so far as they are applicable to *proprietors* other than the author.

D. The meaning of the words "engrave, etch, work, copy, print, publish, * * "

E. The meaning of the words in Section 4965, "every sheet of the same *found in his possession*, either printing, printed, copied, published, imported, or exposed for sale."

A. The argument for the plaintiff in error embraced under (I A); (II. B), pages 6, 10, 11 of his brief, is readily answered. It is said that the plaintiff's declaration did not sufficiently aver the plaintiff's title; or that the photograph was of such an original character as to entitle the author to a copyright; or that a printed copy of the title of the photograph had been delivered before publication at the office of the Librarian of Congress or deposited in the mail addressed to him; or that within ten days after publication two copies of the photograph were thus delivered or deposited.

It will be remembered that the third and fourth counts of the declaration were withdrawn (Record, folio 26, page 9).

The first and second counts contain an express averment that the photographs in question

"*Had been* DULY *copyrighted by them* [the plaintiffs] UPON THE FULL COMPLIANCE BY THEM *with the provisions of the acts of Congress in such case made and provided*, to wit, on the seventeenth day of April, 1886, *and the title of the same*, to wit * * * *was then and there*, DULY RECORDED with the Librarian of Congress *according to the provisions of the acts of Congress in such case made and provided*, and that by virtue of the acts of Congress in such case made and provided they then and there had the sole liberty of printing, reprinting, publishing, completing, copying, executing, furnishing, and vending the same * * *" (Record, folio

This is a sufficient averment of the facts required by the act to be performed in order to vest the title in the plaintiffs, and the general averment is in strict accordance with well established precedent and with the rules of pleading as laid down in the standard authorities. It is neither necessary nor customary to aver specifically the preliminary acts necessary to give the plaintiff a good title, and even if this were not the case any such formal defect in the pleading is cured by the verdict.

The case of Rosenbach *vs.* Dreyfuss, 2 Fed. Rep., 217, referred to on page 11 of the brief of the plaintiff in error, was a demurrer to a complaint, and has no resemblance with or application to the present case.

B. The sufficiency of the evidence.

(A, B, C, D, of I of argument for the plaintiff in error, pages 6, 7–11.)

1. The evidence showed that the plaintiffs were both *authors* and *proprietors* of the copyrighted photograph within the meaning of these words as used in the act of Congress.

***a.* The firm, as such, were the *authors* of the copyrighted photograph.**

The plaintiffs were a firm of photographers, consisting of the four Schreibers (R. 14–15, folios 45, 46). Gerhart and

Henry originally took the photographs (R. fol. 46). Now it may fairly be asserted that a firm carrying on such a business as that of photography are the authors of any photograph produced in their establishment, of which the important original work—*i. e.* the conception of the idea, and the giving it a visible form by posing the object in front of the camera, by arranging the position, by arranging the subjects so as to present graceful outlines, by arranging and disposing of the light and shade, and obtaining the desired expression—was performed by one or more of the members of the firm. In the present case all of this was distinctly shown to have been done by two of the members of the firm, Gerhart and Henry. (R. 15, folio 46; 16, folio 47, 48–9; 17, folio 49–50.)

If a firm are engaged in any business of which the carrying out of special parts under the general authority and management of the firm is intrusted to one or more of the members, the firm in common parlance are the authors of the work so done. Illustrations of this idea may be seen in the preparation of a map, which is one of the earliest instances of a literary composition protected by our copyright law.

Is not the person who has formed the mental conception, who has embraced the idea, and who has carried out that idea by competent mechanical means through the agency of others the author of the map?

We submit that although the evidence is not as full as might have been desired upon the nature of the work done by the members of the firm other than Gerhart and Henry, the jury might reasonably have inferred that they took an actual part in the progress of the work which resulted in the copyrighted photograph. The evidence in this case was first taken, and the case was actually tried before the report of the case of Lithographic Co. *vs.* Sarony, which was published in the regular reports in 1884. On page 16 of the record, folio 47, Gerhart Schreiber says in answer to the question, "Who were present when the negative was taken?"

"No one except myself and Henry were present.

"I don't know, I am not certain that there were any others of the firm there."

And in describing the subsequent details of the photograph and what was done to complete it he uses the pronoun "we" throughout, which of course is applicable to the other members of the firm. There is no doubt that the negative passed through the ordinary processes usual in all photographic establishments, and we submit that it is unimportant after a verdict, what portion of the work done in the establishment upon the copyrighted photograph was performed by the other two members of the firm, viz., Francis Schreiber, Sr., and Conrad Schreiber. Suppose in the division of duties there fell to the lot of one of these partners the business of receiving the customers, of advertising, and of making engagements, &c., while to another was assigned the financial business of the firm, it would surely be an illiberal interpretation of an enabling act to deny to the firm the right to copyright a photograph which was their property because the original work upon it was performed by two of the other members. The result is single, though the process by which it is reached included as many separate acts, and the industry of as many individuals as the making of a pin, and that result may be copyrighted by the various authors, just as two novelists or two playwrights may copyright their joint work. Unless this is the case it is obvious that the common practice of copyrighting literary work, *e. g.* a magazine, by a corporation, as its authors, is void. The corporation consists of a number of stockholders, a number of officers, and a number of agents. Is the right of the corporation in the copyright of the work, as the author of the magazine as a whole, to be held invalid because every individual stockholder, every agent, and every officer of the corporation was not directly engaged in that particular part of the work of the establishment which produced the literary work in question? If this be so the copyrights of the "Atlantic Monthly," of the "Century Company," and other magazines are void; for we know that the purely original work of authorship is in almost every instance performed by those who have no official connection with the company; but it has never been held that the work of arrangement and of selection which gives to one magazine a circulation of a hundred thousand

copies, while another has but one, are not as original and as much the subject of copyright as any insignificant story or sonnet, which contributes but imperceptibly to the character of the whole. Are the productions of such united skill to be denied the privilege of copyright if taken out in the name of a body whose combined efforts have produced the work? Or on the other hand is the author to run the risk of having the copyright declared invalid, because if taken out in a single name it may be afterwards objected that the copyrighted article was produced by the authorship of several persons? The above discussion is, however, academic rather than of actual importance in this case. For whether or not the firm of Schreiber & Sons are, as a firm, the authors of the photograph,

***b.* The firm, as such, were the *proprietors* of the copyrighted photograph, with the assent of the *authors*, and thus come directly under the language of sections 4952 and 4965 of the Revised Statutes.**

The plaintiffs were a firm of photographers, of which Gerhart and Henry, who performed the principal original work, were members. The subsequent work upon the original negative was carried out in the establishment of the firm. The retouching of the picture was done by the several artists who were in the habit of doing the firm's work. Thus Gerhart says (R., 17, folio 51):—

"That the positive picture was slightly retouched by the artist who does our work generally."

And the copyright was taken out in the name of the firm by Gerhart, who himself mailed to the Librarian of Congress two copies of the photograph to be copyrighted in the way they were (R., 15, folio 45–6).

In Yuengling *vs.* Schile, 12 Fed. Rep., 105, cited by the plaintiff in error as "a well reasoned decision" (page 8 of his argument), Brown, J., said:—

"A third person may become such an owner or proprietor through a transfer or assignment, *verbal* or written, embracing the right of copyright after the work is completed, or *by virtue of an original employment under a contract with the author*, which by agreement is to confer

upon the owner both complete ownership of the work itself, and of any copyright that may be obtained thereon. Upon such a contract 'the person who *remunerates*,' says Vice-Chancellor Hall, in Grace *vs.* Newman, L. R., 19 Eq., 623, must be taken to be the equitable assignee of the copyright. Parton *vs.* Prang, 3 Clifford, 537–547, 551; Boucicault *vs.* Fox 5 Blatch,, 87; Little *vs.* Gould, 2 Blatch., 362; Sheldon *vs.* Houghton, 5 Blatch., 285; Paige *vs.* Banks, 7 Blatch., 152; 13 Wall., 608; Drone Copyright, 238, 243–5, 257–9."

Now it is evident that the plaintiffs in this case fulfilled both definitions contained in the above citation.

(*a*) They had become the proprietors through a verbal assignment embracing the right of copyright after the work was completed, by the act of Gerhart Schreiber, acquiesced in by Henry, the active authors of the photograph, in transmitting the photographs to Washington with a request that the copyright should be taken out in the name of the firm; and again

(*b*) The partnership of Gerhart and Henry with the other members of the firm in the business in which this photograph was produced, was an original employment of them, the authors, by the firm which conferred upon the employers—the firm—the complete ownership of the work itself and any copyright that might be obtained thereon. For who would argue that one member of a firm could exclude the firm from the proprietorship of his work done in the usual course of the business. One might as well argue that a member of a law firm had a right to an exclusive copyright of the brief written by him.

No definition could have been framed to cover this case more exactly or fully than that just cited from a decision, which by the counsel for the plaintiff in error is said to be well-rendered and to which he calls the attention of this court.

Grace *vs.* Newman, L. R., 19 Eq, 623, is a good illustration. In that case the plaintiff, the proprietor of a stone and marble business, published a book containing lithographic sketches of monumental designs, compiled by the manager of his business. The sketches were taken from tombstones by means of photographs and drawings. The book was to serve as an advertisement. This was a bill for an injunction by

the *proprietor* against one who had infringed the copyright. The argument for the defendant was similar to that used by the plaintiff in error here. They said that the designs were taken from cemeteries which were open to all; that the book was a mere advertisement, the copying of which hurt no one; that *even if there was a copyright in the book it did not belong to the plaintiff, but to the author of the book*, and that under the copyright act it could not be successfully contended that the plaintiff was the assignee of the author. There had been no writing showing that he was, no title had passed to the plaintiff as assignee of the author.

Vice-Chancellor HALL granted an injunction forthwith, saying:—

> "The person remunerated has no claim to the copyright, and it is the property of the person who remunerates him, and in this court the person who remunerates must be taken to be the equitable assignee, and the proprietor within the meaning of the act. * * * In this case the plaintiff has been right from the beginning and the defendant has been wrong."

Now the evidence was overwhelming to show direct authorship in the strictest sense on the part of Gerhart and Henry Schreiber, and to show proprietorship on the part of the firm, the plaintiffs.

It is wholly unnecessary that the authorship should be exclusive in the sense that the copyrighted work should not in any degree, however insignificant, have been contributed to by others. Gerhart Schreiber testified that he and Henry made the photographic negative by trying it "sixty or seventy times." (R., 16, folio 45.) Sixty or seventy negatives were made in order to produce the photograph. (R., 16, folio 49.) The photograph itself (between pages 40 and 41 of the Record, marked "105 3–4") was offered in evidence, and shows the court the considerable labor and ingenuity that must have been expended in securing the positions of the two animals, which is very striking. The additional work done by persons not members of the firm was purely mechanical. The photograph was slightly retouched, so as to remedy the little defects that might be in it, by washing India ink on it—that is

simply washing out the blotches on it. (R., 15, folio 52.) The object of this was to remedy any indistinctness that might be in it. Another person put in the ground-work—the foreground, about which there is nothing original. (R., 18, folio 53.) This was all the work that was done by others than members of the firm.

It must be recollected too that the jury has found in favor of the plaintiff and this verdict established the originality of the authorship of the plaintiffs, if there is any evidence from which that can be inferred.

2. It is further argued that there was no evidence to show compliance with the act of Congress requiring a printed copy of the title of the photograph to be deposited in the mail addressed to the Librarian of Congress before publication and within ten days of publication two copies of the photograph to be thus delivered. There are several answers to this argument.

(*a.*) In the first place the jury have found the fact that this was done. The sixth point of the defendants though marked reserved (R. 10, folio 29) was affirmed. (See Record, 47, folio 125, in which it is agreed that this point, and the seventh, are to be marked affirmed instead of reserved, and the defendants' exceptions to the ruling of the court were withdrawn.) The sixth point directs the jury to find,

"If the photograph in question could be copyrighted at all, this could be done only by pursuing all the provisions relating thereto contained in the Revised Statutes,"

And the verdict for the plaintiffs must be regarded as a finding that all the necessary provisions were pursued.

(*b.*) In the next place the evidence shows that this was done. Gerhart Schreiber testified that the negatives were originally taken in the end of March or beginning of April. (R. 15, folio 47).

The perfecting of a photograph of this kind in the way described must have taken over a week. Now the certificate of the Librarian of Congress shows that there was deposited with

him in Washington on the 17th of April the title to the photograph in question, and that on the same day two copies of the photograph were deposited. (R., 41, folio 105.) Section 4956 of the Revised Statutes provides that a printed copy of the title of the article to be copyrighted shall be delivered at the office of the Librarian of Congress, or deposited in the mail, addressed to him, before publication, and that two copies of the copyrighted article shall be delivered at the office of the Librarian of Congress or deposited in the mail within ten days after publication. It is quite true that by a slip the question of counsel reads (R., 15, folio 45):—

"Did you cause to be mailed to the Librarian of Congress two copies of that photograph *after* they were published?"

The answer is "Yes, sir." And again (R., 15, fol. 45), "*After* publication and prior to your receipt of that certificate you had sent the photographs to the Librarian of Congress.

"I had sent the photographs—two photographs, that is the law. I sent two copies in that shape to be copyrighted, whereupon I received this certificate."

Now apart from the question of the effect of the verdict as showing how the jury as instructed by the defendants' sixth point certainly understood these questions and answers, the act of Congress says that the author shall have ten days after publication within which to mail his photographs to the Librarian of Congress. The jury might reasonably infer from the dates that this was done even if it be admitted that Mr. Schreiber's answers was intended to state that he had mailed the photographs after publication instead of before. He had testified that the photograph was begun in the end of March or beginning of April; the photographs must have been mailed on the 16th of April, and the inference is irresistible that they were mailed within ten days of the completion of the photograph. But the matter is clearly explained in folio 57, page 20 of the record. As a matter of fact *the photographs, containing the title* (*see the photograph in evidence and the Librarian's certificate*), *were sent* PRIOR *to publication, not after*, and this was clearly understood by counsel, court, and jury. Gerhart Schreiber, when asked in cross-examination what he meant by *publishing* the photographs, his attention

being at the same time drawn to the fact that he had said that he sent the photographs to Washington *after* publication, answered :—

"I had copies for sale, *that is what I meant by publication.*
"Q. You had them for sale?
"A. Yes, sir.
"Q. They were exposed for sale?
"A. Yes, sir.
"Q. Before you sent them to Washington?
"A. Yes, sir. *I mean by publication that I had copies for sale,* BUT THEY WERE NOT EXPOSED FOR SALE.
"Q. They were not exposed for sale?
"A. THEY WERE NOT EXPOSED FOR SALE BEFORE I SENT THE COPIES TO WASHINGTON."

In a word the title and photographs were sent at the same time to Washington prior and not subsequent to publication, and this must have been as soon as they were finished. They were not published and not exposed for sale until after this was done, although they were completed and in the possession of the plaintiffs ready for sale.

The certificate of the Librarian of Congress was therefore unnecessary to prove the facts stated therein, but whether necessary or not it was admitted and given in evidence without objection or exception, and of course no objection can now be raised. Moreover, even if excepted to at the time of the trial the certificate would have been admitted as evidence of the facts stated within it, being a record kept by a public officer of matters within the line of his duty required by law.

See Evanston *vs.* Gunn, 99 U. S. Repts., 660, 664, at 666–7. The copy was properly verified, and no objection was offered to the method of verification or to the fact that the paper offered was a copy instead of an original. All such objections were of course waived, no exception being taken at the trial.

We do not further discuss the third proposition of the argument of the plaintiff in error (11 and 12 of his brief) inasmuch as the evidence shows conclusively that all of the original work of the photograph was done by the plaintiffs, or at least by two of them, and that no original work was

done by any one else, and because it is of daily experience that the legal proposition therein stated is incorrect. Copyrights being every day upheld where the author copyrighting has performed only a portion, perhaps insignificant, of the work copyrighted.

C. We have already shown the meaning of the word proprietor in section 4965 of the Revised Statutes.

Is the act constitutional so far as it relates to a copyright of a proprietor of a photograph?

While the constitutionality of the act, so far as it entitles the *proprietor* of a *photograph* to copyright it, has never been decided by this court, that is the necessary inference from the decisions actually made. It has been repeatedly held that the proprietor of a literary work can copyright it, and this must follow in the case of a photograph, as the language of the act applies to both writings and photographs, unless the act is unconstitutional so far as it permits the copyrighting of a photograph in any case. But that this was not the case was decided in Lithograph Co. *vs.* Sarony, 111 U. S., 53, 55, 61, which was argued in December, 1883, after this case was tried. The result of that decision is, that if the record shows that there was that degree of originality in the photograph which would justify a writing to be copyrighted, whether in its original conception or in its execution, the photograph may be the subject of a copyright and the act is constitutional.

We shall not again refer to the evidence upon this subject; but it is clear that there was as much originality in the work done by Gerhart and Henry Schreiber in posing the animals and taking sixty or seventy negatives as in the work done by Sarony in posing and taking the photograph of Oscar Wilde. In addition to this the verdict of the jury establishes this fact, for they were expressly told (defendants' seventh point, R., 10, folio 29, which was affirmed by the court, R., 47, folio 125) that section 4965 of the Revised Statutes was to be construed strictly and literally, and not by inference or implication.

The case of Nottage *vs.* Jackson, L. R., 2 Q. B., 627, while defining the meaning of the word *author*, has no other application to this case, because the English statute, unlike ours, requires that the name of the author shall be correctly stated in the application for the copyright, and the only question in that case was whether the name of the author had been correctly stated, and not, as here, whether the proprietor, as contradistinguished from the author, could copyright a photograph. It was cited by Mr. Justice MILLER to show what degree of originality would entitle a person to style himself the author of a photograph.

D. The fourth proposition of the plaintiff in error is an extraordinary assertion which is unsustained by the citation of a single authority. This statute, which has been in substantial existence since 1710, when the statute of 8 Ann. c. 19, was passed, and which was avowedly passed for the purpose of protecting an innocent person who was injured in the proprietorship of his property and to punish the wrongdoer, is to be so construed, we are told, as to permit the guilty party to escape and to punish, if any one, one who is probably not guilty of any criminal motive. The question is whether or not the words in section 4965 of the Revised Statutes,

"Engrave, etch, work, copy, print, publish, or import,"

are to be so construed as to include or exclude the person who intentionally and piratically engraves, works, copies, prints, publishes or imports the copyrighted work of another. The argument on the other side is that if a person imports a copyrighted work, or prints or publishes it without the assent of the author or proprietor, he is not responsible, although he has committed the acts voluntarily and with knowledge of the existence of the copyright, but that the printer who sets the type, or the lithographer who applies the colors, or the corporation which owns the vessels in which the work is imported, are responsible. In other words, that in the present case Ketterlinus the lithographer and his printers, although they probably supposed that Thornton had obtained the right

of reproducing the photograph from the proprietors and innocently did their work, are to be fined and Thornton to escape. The answer to the argument is that while a penal statute is to be construed strictly, it is to be so construed as to carry out the intention of the lawgiver in a reasonable way. Is my neighbor, who knows that he is wrongfully injuring me by importing a reproduction of my copyrighted work from abroad not within the penalty of the act, while the steamship company which carries the packages of books as freight without a knowledge of their contents, is to be severely punished? This is the result of the fourth proposition of the plaintiff in error. And if the person intended to be punished under the definition of the importer by section 4965 of the Revised Statutes is not, or not only, the person who actually conducts the importing, but the person who directs the importation, and who in popular phraseology is the importer, then the other words, viz., "engrave, etch, work, copy, print, and publish" are to be understood in the same sense. And this is merely giving to these words the signification they have by popular usage. Thus we hear a publisher say, I printed one thousand copies of such and such a work, although the printing may have been done by an independent person for the publisher at a fixed price. In the common language of common men, Thornton printed and copied the copyrighted photograph in question.

The reason why the words "or caused to be printed or published any copy" which are found in the act of 1831 were left out in the present act was simply because they were thought unnecessary. See the discussion of Brown, J., in Yuengling *vs.* Schile, *supra*, as to the converse of this proposition in reference to the first use of the word "proprietor" in the act of 1870, which he held in that case added no new meaning to the act as it existed before, and which he declined to read in its literal and independent sense. The fact that Thornton was in the employment of Sharpless Brothers does not alter the case; he acted independently without their knowledge in ordering the photographs printed.

But nothing has been left for conjecture as regards the meaning which Congress intended by the use of the words in question, for Congress has itself defined them in section 4952 of the Revised Statutes (page 957) in the broad sense which we contend for.

The argument for the plaintiff in error upon this point is as follows:—

"The penalty by the act of 1870 is to be imposed upon the person who engraves, etches, works, copies, publishes, prints, or imports any copy of the map, photograph, book, or other article which has been duly copyrighted. Being a penal act the statute is to be construed strictly, and hence does not apply to a person who *causes another* to engrave, etch, work, copy, print, publish, or import. And this argument is strengthened by the fact that in the act of 1831, where Congress intended to punish such a person, the additional words were used (and therefore must be considered to have been essential):—

"Or cause to be published, sold or exposed to sale * * *"

Which additional words are not to be found in the act of 1870.

But if this argument were valid, how are we to understand the omission of the latter phrase ("or causes to be published, &c.,") in section 4952 R. S., 2. That section reads as follows:—

"*Any* citizen of the United States or resident therein, who shall be the *author*, inventor, designer, or *proprietor* of any book, map, chart, * * * print or photograph or negative thereof * * * *shall* upon complying with the provisions of this charter *have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same* * * *."

According to the construction of the plaintiff in error, this phrase will only cover the right of printing, publishing, copying in the restricted sense and *not* in the sense of *having or causing another* to print, publish, copy, execute, or vend, because of the absence of the words—

"Or causing to be printed, &c."

But no lawyer will have the hardihood to contend that the right conferred by section 4952 of the R. S. is not to be understood in its broadest sense, and it is one of the first rules of the construction of a statute that where the legislature has fixed a particular meaning upon a particular phrase the same meaning is to be given to the same phrase in other parts of the same statute. Hence the same words "print, reprint, publish, copy," &c., must be understood in the same sense in section 4965 as in section 4952, and as in the latter section the context shows that the broad meaning was necessarily intended by the legislature, the same broad meaning must be given to the same words in the former section.

E. We come now to the last argument of the plaintiff in error, viz., that the copies of the labels, though, as we are told by our ingenious opponent, they were in the *custody*, were not in the *possession*, of Thornton. A number of cases are cited, depending upon English statute law, from Stephen's Digest of Criminal Law, page 217, article 281, which arise upon the distinction of crimes of *embezzlement* and of *larceny*, and which have nothing whatever to do with the meaning of the word *possession* as used in the Revised Statutes. The absolute technicality of the subject and the fact that the discussion is confined to the crimes of larceny and embezzlement are shown by Mr. Stephen's note to page 215 of his Digest of Criminal Law, in which he says :—

"This and the following chapters have, I fear, a somewhat abstract appearance, but it is impossible to understand the provisions of the *larceny act* without a knowledge of the doctrines which it presupposes, that is to say, the doctrine as to the definition of theft and as to things capable of being stolen. The definition of theft turns on the doctrine of *possession* (See note 17), and this is unintelligible except in relation to the doctrine of property."

And on page 404, note 17, of the same work, the author says in reference to the definition which he has just given of *possession* and *custody* :—

"I do not think it would be possible to assign to the expressions, possession, actual possession, constructive possession, legal possession, senses which would explain and reconcile all the passages in which these phrases occur in works of authority. Some of them indeed are absolutely contradictory. Thus it is said that the taking in larceny must

be a taking out of the *possession* of the owner. It is also said that the owner retains the legal *possession* notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told, on the other hand, that the taking in larceny must be a taking out of the *possession* of the owner, the inference from which would naturally be that when a thing is out of the owner's *possession* it cannot be stolen. We are then told, in order to avoid this conclusion, that a thing is always in its owner's *possession*, &c. * * *However, though it is impossible either to justify the manner in which the word possession is used, or to free it entirely from the fictions with which it has been connected*, it is, I think, not impossible to define it in such a manner as to express all the distinctions which it is intended to mark, in language differing very slightly if at all from that which has generally been used upon the subject."

To show the absurd result that would follow from the adoption in the copyright statutes of the technical meaning of the word *possession*, insisted upon by the counsel for the plaintiff in error, we may refer to Cartwright *vs.* Green, 8 Vesey, 405, (cited by Stephen at page 405), in which "A put nine hundred guineas in a secret drawer in a bureau and died. B, her son and executor, loaned the bureau to his brother C, who took it to India, kept it there for several years and brought it back. B then sold it to D, who gave it to E to repair, who found the money. *This was held to be such a taking by E out of the possession of A* [who be it remembered was long since dead] as to constitute larceny."

Yet this court is seriously asked to adopt a definition of the word *possession* which is confessedly drawn from purely technical and metaphysical distinctions in the criminal law relating to embezzlement and larceny, and that, too, where the definition is framed solely in contradistinction to the word *custody*.

The question is, what is the fair intendment of an act of Congress framed to protect property and to punish him who invades it? We believe that the meaning of the words "*found in his possession*" is to be interpreted as follows: The word "*found*" must be referred to the finding of the jury, and means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act such person shall forfeit one dollar for each sheet so found, or

ascertained to have been in his possession. That this is the meaning of the word "*found*" seems obvious from the concluding language of the statute, which is as follows:—

"And in case of a painting, statue, or statuary he shall forfeit ten dollars for every copy of the same *in his possession*, or by him sold or exposed for sale."

The use of the word "*found*" in the first clause and its absence in the second does not alter the sense of the two which are obviously intended to be the same, both as regards books and photographs and as regards paintings and statuary. No motive for the presence of the word in the first clause can be advanced which is not equally applicable to the second, where it is absent. If we are right in this construction of the act it gives rise to the penalty of one dollar for every sheet *in the possession of the defendant*. And this must mean in his possession at any time within the two years up to the bringing of the action.

In Dwight *vs.* Appleton (1 N. Y. Leg. Observer, 198) the report says that

"The jury were authorized (by Mr. Justice Thompson, one of the judges of this court, who tried the case) to give fifty cents for every sheet contained in the volumes *found, at any time* within the period stated in the declaration, TO HAVE BEEN IN THE POSSESSION of the defendants. The law applies to all the copies which the defendants had imported or sold or held for sale contrary to the rights of the plaintiffs."

The case of Backus *vs.* Gould, 7 Howard, 798, only decides that the defendant must at some time have had possession of the pirated sheets, whether before or after publication. In that case no evidence had been given that the defendant had ever, at any time, had possession of the matter in question, although he had published it. See, there is nothing in the act to define the time when the possession is to exist. If at any time at, or after, the wrongful act of engraving, printing, &c., was committed, the defendant, according to the jury's finding, had possession of the sheets, then the statute operates and the penalty is incurred. Now the evidence shows distinctly that none of Thornton's employers had any knowledge

of Thornton's act until the 27th of April (R., 36, folio 93.), and on that day, undoubtedly, the tickets were in the possession of Thornton and of no other person; because his employers would have had a perfect right to repudiate his unlawful act and to refuse to pay for the labels, or to hold Thornton responsible for the price. Thornton was a general superintendent of the wholesale domestic department, having under his control the purchasing of the goods, the making of the price, the seeing that they were sold (R., 37, folio 94). The tickets were delivered on the 26th of April and the circulars on the 1st of May (R., 36, folio 92). The tickets were therefore delivered, at Thornton's instance, to the establishment of which he had entire control, and were clearly in his possession on the 26th of April, and never would have been in the possession of his employers unless they had afterwards chosen to ratify the act. And the ratification of the purchase of the tickets was not a ratification of the purchase of the circulars, which were delivered May 1st. As to them too, therefore, there was a period in which they were in the exclusive possession of Thornton and not that of the firm. Let us illustrate by a simple instance. Suppose my servant knowingly receives stolen goods and brings them to his room in my house without my knowledge, are not those goods in his *possession*, so that he may be convicted under a statute providing for the conviction of a person having stolen goods in his possession?

The fallacy of the argument is moreover clearly shown by a comparison of the English acts upon the same subjects with the act of Congress. The argument of the plaintiff in error is to the effect that the word "*possession*" in the act is distinguishable from the word "*custody*" (which does not occur), and can only apply to the master and principal, and not to the servant and employé.

If this proposition is true the converse of it must *a fortiori* be true, and where the statute uses the word "*custody*" and not the word "*possession*," it must be held to apply only to the servant and agent, and not to the master and principal, and from this argument there is no escape. Now by refer-

ence to Backus *vs.* Gould, 7 How., page 806, line 1, *Id.* line 27, it will be found that in the British statute from which ours is drawn the word "*custody*" and not the word "*possession*" is used; and, therefore, if the argument of the plaintiff in error upon this point be correct, no principal or master could ever be convicted under that statute, because a principal can never have the *custody* of an object of which he has the *possession*, or in other words, the British statutes from which ours were taken, were framed to punish servants only; in case of piracy by the master, a most amusing *reductio ad absurdum*.

That the very words *custody* and *possession* in a statute of this kind are interchangeable is shown by the fact that to accomplish the same object the English statutes have always used the word *custody*, while our acts have always used the word *possession;* and Mr. James Bayard in arguing the case for the plaintiff in error, in Backus *vs.* Gould, showed his understanding that the words had the same signification, for in speaking of the acts of Congress, which as we have seen always used the word *possession* and never the word *custody* (see the act of 31st of May, 1790, at page 808, and the words of the act of 3d February, 1831, at pages 808–9 of that report), he said (807):—

"And it is very evident from this examination that where the legislature (*i. e.*, Congress) intended to extend a penalty beyond the books and sheets found in the *custody* of the offender, they have said so in such a way as to leave no doubt about it." * * *

And in the same paragraph immediately prior to the last citation, he says:—

"I have thus been particular in the examination of these British statutes because the acts of Congress have been taken from them, * * and in many instances copied the very words."

Thus the learned counsel and Senator whose elaborate argument won that case was himself of opinion:—

1. That the acts of Congress were themselves taken from the British statutes which should be particularly cited to ascertain the meaning of the acts of Congress; and

2. That the words "*possession*" and "*custody*" had the same signification in the two statutes, he himself stating that the act

of Congress provided for the punishment of the offender in whose *custody* the sheets were found, whereas in truth the word used in the act was the word *possession.*

Another consideration, however, independently of the reasons already adduced, shows that the definition of the word "*possession*" given by the plaintiff in error cannot be sustained.

His argument is that as in certain English cases the words "*possession*" and "*custody*" have been distinguished and the former, used to define *ownership and occupancy combined* and the latter, *occupancy without ownership, by an agent or servant,* the labels and circulars in this case were never in the "*possession*" of the defendant, though they may have been, perhaps, in his "*occupancy*" or "*custody.*"

The whole of this ingenious argument rests upon the assumption that "*possession*" can only be asserted of an *owner,* though "*custody*" or "*occupation*" may be asserted of one who is the agent or servant of the owner.

But if this argument were sound no one could ever have "*possession*" of the copied sheets within the language of section 4965, for according to the argument of the plaintiff in error, no one but the owner can be said to have "*possession,*" while by the terms of the act itself, the ownership in such copyrighted sheets by the mere fact of being copies printed, worked, &c., by the wrongdoer, is vested in the proprietor of the copyright.

"* * * He shall forfeit to the *proprietor* all the plates * * *and every sheet thereof either copied or printed,* and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale."

Therefore, according to the argument of the plaintiff in error, when the act speaks of the "*possession*" of the sheets by the wrongdoer (who, by the very terms of the act, cannot have any property in those sheets at any time after they were copied or printed, whether in his physical occupancy or not), Congress has committed the absurdity of disregarding the purely technical meaning of the word "*possession*" drawn from contradictory cases upon English criminal statutory law; and

though the word "*possession*" in the act *can only refer to custody or occupancy of one not the owner*, and in opposition to the rights of the owner, *ownership solely* and *not* custody or occupancy are to be understood.

The most severe criticism of the argument lies in the statement of it.

To show that the word "possession" is ordinarily understood in the sense contended for by us, we may refer to the following authorities:—

Shakespere's knowledge of law was not limited to fines and recoveries, and we confidently quote his use of the word "*possession*," as showing common usage (Cymbeline, Act III., Scene 5, where Cloten says to Pisanio, the servant):

"Hast any of *thy late master's garments in thy possession?*"

And see Webster:

"In bailment the bailee who receives goods to convey or to keep for a time, has the *possession* of the goods, and a temporary right over them, but not the property."

"The state of owning or having a thing in one's own hands or power."

Wharton's Law Lexicon.

Noy (Maxims) says there can be "*possession*" by the tenant of his term of years though no seizin, yet a tenant for years is a mere bailiff or servant of the landlord.

The opening sentences of Mr. Smith's note to the leading case of Armory *vs.* Delamirie (1 Strange, 505) 8th, American edition (1885) of Smith's Leading Cases, part 1 of Vol. I., 680, are as follows:—

"This is the case usually referred to for the purpose of illustrating that leading principle of law, that bare *possession* constitutes a sufficient title to enable the party enjoying it to obtain legal remedy against a mere wrongdoer. It would be almost a waste of time to enumerate the modern decisions by which this proposition is enforced and explained. Two of the most remarkable are Sutton *vs.* Buck, 2 Taunton, 302, and Burton *vs.* Hughes, 2 Bingham, 173, where property having been lent to the plaintiff under a written agreement, it was nevertheless held, that he might maintain trover for it without producing the agreement, for though if it had been necessary to prove the nature of his interest in it, the rules of evidence would have rendered the production of the writing indispensable, still as *possession* is a sufficient title against a wrongdoer, *it was*